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In The

Supreme Court of the United States

October Term, 1994

SHRICHAND CHAWLA, LEO D. CURRAN, WILLY HERMANS, RED CIRCLE INVESTMENT, LTD., JALEH KHORASSANCHY, AMIT PANDYA, SOHA, INC., IDRISS DEVCO, INC., and S&L GENTRADE, INC.,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent

Petition For Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Are defrauded bank depositors who assert a constructive trust or a related theory over forfeited assets of the Bank of Credit and Commerce International ("BCCI"), an illegal enterprise, entitled to an amended forfeiture order under Section 1963(l)(6)(A) of the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §1963(l)(6)(A), where Petitioners assert that they have a "legal right, title, or interest in the [forfeited] property . . . [that is] superior to any right, title, or interest of the defendant [BCCI] at the time of the commission of the [RICO predicate] acts which gave rise to the forfeiture"? (Yes)

PARTIES TO THE PROCEEDING

Petitioners are Shrichand Chawla, Leo D. Curran, Willy Hermans, Red Circle Investment, Ltd., Jaleh Khorassanchy, Amit Pandya, Soha, Inc., Idriss Devco, Inc. and S&L Gentrade, Inc., who were the Claimants-Appellants in the District of Columbia Circuit. Respondent is the United States of America, which was the Plaintiff-Appellee in the court below.

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Beatty v. Guggenheim Exploration Co., 225 N.Y. 380, 122 N.E. 378 (1919) 23

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Chauffeurs Teamsters & Helpers, Local No. 391 v. Terry, 494 U.S. 558 (1990) 17

China Fire Ins. Co. v. Davis, 50 F.2d 389 (2d Cir.), *cert. denied*, 284 U.S. 658 (1931) 24

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Humble Oil & Refining Co. v. Sun Oil Co., 191 F.2d 705 (5th Cir. 1951), *cert. denied*, 342 U.S. 920 (1952) 17

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Moore v. Crawford, 130 U.S. 122 (1889) 23

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Ocean Energy II, Inc. v. Alexander & Alexander, 868 F.2d 740 (5th Cir. 1989) 8, 9

Old Security Life Ins. Co. v. Continental Ill. Nat'l Bank & Trust Co., 740 F.2d 1384 (7th Cir. 1984) 24

Osin v. Johnson, 243 F.2d 653 (D.C. Cir. 1957) 24

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Rolfe v. Gregory, 4 Deg. J. & S. 576 (1864) 23

Russello v. United States, 464 U.S. 16 (1983) 16

SEC v. Levine, 689 F. Supp. 317 (S.D.N.Y. 1988), *aff'd in part and rev'd in part on other grounds*, 881 F.2d 1165 (2d Cir. 1989) 22, 27

SEC v. Paige, 1985 Westlaw 2335, 1985 U.S. Tax Cas. (CCH) ¶9588 (D.D.C. July 30, 1985), *aff'd*, 810 F.2d 307 (D.C. Cir. 1987) 22

St. Louis & S.F.R. v. Johnston, 133 U.S. 566 (1890) 24

Torres v. $36,256.80 U.S. Currency, 25 F.3d 1154 (2d Cir. 1994) 11

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United States v. All Assets of Statewide Auto Parts, Inc., 971 F.2d 896 (2d Cir. 1992) 15

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United States v. Cauble, 706 F.2d 1322 (5th Cir. 1983), *cert. denied*, 465 U.S. 1005 (1984) 17

United States v. Delco Wire & Cable Co., 772 F. Supp. 1511 (E.D. Pa. 1991) 17

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United States v. James Daniel Good Real Property, ___ U.S. ___, 114 S. Ct. 492 (1993) 14

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United States v. Kramer, 912 F.2d 1257 (11th Cir. 1990) 17, 19

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United States v. Lavin, 942 F.2d 177 (3d Cir. 1991) 11, 20, 21

United States v. Libretti, 38 F.3d 523 (10th Cir. 1994), *cert. granted*, No. 94-7427, 1995 U.S. LEXIS 2258 (Mar. 27, 1995) 14

United States v. Marx, 844 F.2d 1303 (7th Cir. 1988) 11, 22

United States v. Monsanto, 491 U.S. 600 (1989) 16

United States v. One 1976 Mercedes Benz, 618 F.2d 453 (7th Cir. 1980) 18

United States v. One Parcel of Real Estate Property, 660 F. Supp. 483 (S.D. Miss.), *aff'd on other grounds*, 831 F.2d 566 (5th Cir. 1987) 28

United States v. Pelullo, 14 F.3d 881 (3d Cir. 1994) 17, 18

United States v. Reckmeyer, 836 F.2d 200 (4th Cir. 1987) 11, 16, 19

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United States v. Stowell, 133 U.S. 1 (1890) 28

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Zenith Radio Corp. v. Hazeltine Research, 395 U.S. 100 (1969) 17

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18 U.S.C. §1963 ..... *passim*
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21 U.S.C. §848 17
21 U.S.C. §853 ..... 11, 17, 22
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SECONDARY AUTHORITIES

V Austin Wakeman Scott & William Franklin Fratcher, *The Law of Trusts* §463 (4th ed. 1989) 23, 24, 26

Comment, *RICO Forfeiture: Secured Lenders Beware*, 37 UCLA L. Rev. 1199 (1990) 15, 28

1 David B. Smith, *Prosecution and Defense of Forfeiture Cases* ¶ 1.02 (1985 & Supp. 1994) 14

Departments of Commerce, Justice and State, the Judiciary and Related Agencies Appropriations for 1995, Hearings Before the House Subcomm. on Appropriations, 103rd Cong., 2d Sess. 781 (1994) 16

I George E. Palmer, *The Law of Restitution* §1.3 (1989) 23, 24

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Joseph Story, *Commentaries on Equity Jurisprudence* §1219 (1st Eng. ed. 1884) 9

Note, *Tempering the Relation-Back Doctrine: A More Reasonable Approach to Civil Forfeiture in Drug Cases*, 76 Va. L. Rev. 165 (1990) 28

Restatement of Restitution §160 (1937) 23

Restatement (Second) of Trusts, §1 (1937) 23

S. Rep. No. 225, 98th Cong., 2d Sess. 193 (1983), *reprinted in* 1984 U.S. Code Cong. & Admin. News 3182 ..... 16, 19, 20

Steven L. Schwarcz & Alan E. Rothman, *Civil Forfeiture: A Higher Form of Commercial Law?*, 62 Fordham L. Rev. 287 (1993) 15

Thomas J. Lueck, *Port Jefferson Auto Dealer Forfeits Most of His Assets*, N.Y. Times, May 20, 1992, at B1, B5 13

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Petitioners,

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UNITED STATES OF AMERICA,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

PETITION FOR WRIT OF CERTIORARI

Petitioners herein respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the District of Columbia Circuit entered in this RICO forfeiture action on February 14, 1995.

OPINIONS BELOW

The decision of the court of appeals is reported at 46 F.3d 1185 (D.C. Cir. 1995). *See* A-1 through A-16. The decision of the district court is reported at 833 F. Supp. 9 (D.D.C. 1993). *See* A-17 through A-34. Pursuant to Supreme Court Rule 14.1(k)(ii), a district court decision in a related case, *In re Bank of Credit and Commerce Int'l Depositors Litig.*, MDL Docket No. 908, is reported at 15 RICO L. Rptr. 1234 (C.D.

Cal. May 20, 1992), *aff'd*, No. 92-56085, 1995 U.S. App. LEXIS 7693 (9th Cir. Apr. 7, 1995) (petition for rehearing and suggestion for rehearing *en banc* filed on Apr. 21, 1995). *See* A-35 through A-72.

BASIS FOR JURISDICTION

The final judgment of the court of appeals was entered in this case on February 14, 1995. This Court has jurisdiction to review the judgment of the court of appeals pursuant to 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

Section 1963(l) of RICO provides:

> (l)(1) Following the entry of an order of forfeiture under this section, the United States shall publish notice of the order and of its intent to dispose of the property in such manner as the Attorney General may direct. The Government may also, to the extent practicable, provide direct written notice to any person known to have alleged an interest in the property that is the subject of the order of forfeiture as a substitute for published notice as to those persons so notified.
>
> (2) Any person, other than the defendant, asserting a legal interest in property which has been ordered forfeited to the United States pursuant to this section may, within thirty days of the final publication of notice or his receipt of notice under paragraph (1), whichever is earlier, petition the court for a hearing to adjudicate the validity of his alleged interest in the property. The hearing shall be held before the court alone, without a jury.
>
> (3) The petition shall be signed by the petitioner under penalty of perjury and shall set forth the nature and extent of the petitioner's right, title, or interest in the property, the time and circumstances of the petitioner's acquisition of the right, title, or interest in the property, any additional facts supporting the petitioner's claim, and the relief sought.

(4) The hearing on the petition shall, to the extent practicable and consistent with the interests of justice, be held within thirty days of the filing of the petition. The court may consolidate the hearing on the petition with a hearing on any other petition filed by a person other than the defendant under this subsection.

(5) At the hearing, the petitioner may testify and present evidence and witnesses on his own behalf, and cross-examine witnesses who appear at the hearing. The United States may present evidence and witnesses in rebuttal and in defense of its claim to the property and cross-examine witnesses who appear at the hearing. In addition to testimony and evidence presented at the hearing, the court shall consider the relevant portion of the record of the criminal case which resulted in the order of forfeiture.

(6) If, after the hearing, the court determines that the petitioner has established by a preponderance of the evidence that –

(A) *the petitioner has a legal right, title, or interest in the property, and such right, title, or interest renders the order of forfeiture invalid in whole or in part because the right, title, or interest was vested in the petitioner rather than the defendant or was superior to any right, title, or interest of the defendant at the time of the commission of the acts which gave rise to the forfeiture of the property under this section*; or

(B) the petitioner is a bona fide purchaser for value of the right, title, or interest in the property and was at the time of purchase reasonably without cause to believe that the property was subject to forfeiture under this section;

the court shall amend the order of forfeiture in accordance with its determination.

(7) Following the court's disposition of all petitions filed under this subsection, or if no such petitions are filed following the expiration of the

> period provided in paragraph (2) for the filing of such petitions, the United States shall have clear title to property that is the subject of the order of forfeiture and may warrant good title to any subsequent purchaser or transferee.

18 U.S.C. §1963(l) (emphasis added).

STATEMENT OF THE CASE

A. BCCI's Seizure, Guilty Plea And Liquidation

Petitioners, who are American citizens and residents, represent a class of nearly one million worldwide depositors who lost at least $8 billion in July 1991 when bank regulators in the United States (and other countries) seized and shut down the operations of the four principal financial institutions that collectively made up the RICO criminal enterprise known as BCCI.[1] These regulatory measures, prompted by conclusive evidence of BCCI's insolvency and extensive dealings in criminal affairs, were followed by the appointment of fiduciaries for BCCI by courts in Luxembourg and the Cayman Islands, the jurisdictions in which the principal entities were incorporated. A worldwide effort was then begun to consolidate all BCCI assets wherever located for distribution to creditors. A-3.

BCCI's collapse prompted a flurry of civil and criminal investigations by various state and federal agencies in the United States and criminal charges were brought against BCCI in several jurisdictions. On November 15, 1991, the government filed an indictment against BCCI charging it with various crimes, including violations of RICO, wire fraud and conspiracy. Negotiations between law enforcement officials and the court-appointed BCCI fiduciaries ultimately led to a

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[1] These four organizations were BCCI Holdings (Luxembourg), S.A., Bank of Credit and Commerce International (Luxembourg), S.A., Bank of Credit and Commerce International (Overseas) Limited, and International Credit and Investment Company (Overseas) Limited. At the time of the shutdown, these BCCI companies had operations in 69 countries. A-2 to A-3.

plea agreement filed with the federal district court in the District of Columbia. The agreement required BCCI to plead guilty to several state and federal criminal and civil charges, including violations of RICO, 18 U.S.C. §§1961-1968, and to forfeit to the Justice Department all BCCI assets located in the United States. It also provided, pursuant to RICO, that one-half of all sums recovered by the government would be devoted to reimbursing BCCI's defrauded depositors; the other half was to be reserved for the Attorney General's discretionary allocation among several enumerated purposes, which included offsetting losses to "the Bank Insurance Fund of the FDIC and United States taxpayers" resulting from BCCI's collapse and making further contributions to the global liquidation fund. The plea agreement, with its RICO forfeiture provision, was approved by supervising courts in Luxembourg and the Cayman Islands and the district court formally accepted the plea agreement on January 24, 1992. A-3 to A-4.

B. BCCI Forfeiture Proceedings

Shortly thereafter, pursuant to §1963(l) of RICO, the district court issued the first of several orders forfeiting all identified BCCI property located within the United States; later forfeiture orders were issued by the district court in response to the discovery of additional assets. The forfeited amount – in aggregate approximately $522 million – largely came from bank accounts maintained at various United States banks in the names of specific overseas branches of BCCI. Following the district court's issuance of the forfeiture orders, numerous third parties, Petitioners among them, filed petitions claiming legal interests in the BCCI assets forfeited to the government pursuant to §1963(l) of RICO. A-4.

Under RICO, third parties may challenge a forfeiture order if they can assert that they have a "legal interest in property which has been ordered forfeited." 18 U.S.C. §1963(l)(2). A party who files a petition alleging a legal interest that, if established, would compel amendment of the forfeiture is then entitled to a hearing, *see id.* at A-5, during

which the petitioner is entitled to present evidence, including testimony from witnesses. 18 U.S.C. §1963(l)(5). Section 1963(l)(6) sets forth the alternative grounds upon which the district court may grant relief:

> If, after the hearing, the court determines that the petitioner has established by a preponderance of the evidence that –
>
> (A) *the petitioner has a legal right, title, or interest renders the order of forfeiture invalid in whole or in part becuase the right, title, or interest in the property, and such right, title, or interest was vested in the petitioner rather than the defendant or was superior to any right, title, or interest of the defendant at the time of the commission of the acts which gave rise to the forfeiture of the property under this section;* or
>
> (B) the petitioner is a bona fide purchaser for value of the right, title, or interest in the property and was at the time of purchase reasonably without cause to believe that the property was subject to forfeiture under this section;
>
> the court shall amend the order of forfeiture in accordance with its determination.

18 U.S.C. §1963(l)(6) (emphasis added). In the courts below Petitioners sought relief under *both* subsections of §1963(l)(6), to no avail. A-6.

C. The Hamid Class Action

After the collapse and seizure of BCCI and the concomitant loss of their multi-billion dollar deposits, in August 1991, Petitioners filed a RICO class action in the United States District Court for the Central District of California against BCCI's founders, officers and directors, as well as the attorneys, accountants and numerous related third parties who actively and knowingly assisted in the massive fraudulent scheme that fraudulently induced Petitioners deposits and then deprived them of their money while BCCI operated for

many years as an illegal RICO enterprise.[2] Petitioners' 482-page amended complaint (accompanied by 2,003 pages of exhibits, including copies of criminal indictments, guilty pleas and U.S. Senate and other government investigative reports detailing defendants' wrongdoing), which was filed in the California federal district court on January 30, 1992, contained detailed allegations concerning BCCI's involvement in numerous criminal activities, regulatory violations stemming from BCCI's secret ownership and control of several U.S. financial institutions, and the worldwide fraud perpetrated upon depositors that ultimately ended in BCCI's financial collapse and the concomitant loss of their deposits.

In the *Hamid* Class Action, depositors alleged that defendants' fraudulent scheme caused them to lose billions of dollars in deposits because (1) depositors were defrauded into placing their deposits into the various parts of a criminal enterprise, instead of a legitimate banking enterprise, because BCCI and its insiders falsely represented that it had substantial assets, profitability and lawful operations and would be able to honor depositors' claims; (2) the ongoing existence of the BCCI criminal banking enterprise would not have been possible had the defendants (including BCCI's attorneys and accountants) not helped BCCI continue to operate by failing to publicly disclose its true nature and actively assisting it to avoid detection by regulators; (3) as a continuing operation, the BCCI criminal banking enterprise continued to fraudulently accept depositors' money; and (4) because of defendants' racketeering acts (which constituted the operation of BCCI), bank regulators seized BCCI on July 5, 1991, freezing depositors' funds and precipitating their multi-billion dollar losses. A-41 to A-42. In May 1992, however, the district court dismissed the *Hamid* Class Action complaint on standing grounds, incorrectly holding that the defrauded depositors'

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[2] *In re Bank of Credit and Commerce Int'l Depositors Litig.*, Docket No. MDL-908; *Hamid v. Price Waterhouse & Co.*, Case No. CV 91-4483 CBM(Ex) (C.D. Cal. Class Action Complaint filed on Aug. 21, 1991) ("*Hamid* Class Action"). *See* A-39 to A-40.

claims were "derivative" of BCCI rather than direct and that their injuries were not ripe because all or part of their claims might be eventually satisfied through BCCI's foreign liquidation proceedings. That decision was recently affirmed by the Ninth Circuit Court of Appeals, where the depositors' petition for rehearing and suggestion for rehearing *en banc* is currently pending.[3]

D. Proceedings In The Courts Below

1. Petitioners' Section 1963(l) Petitions

As noted above, as part of its criminal plea bargain, BCCI forfeited its ownership interest in all BCCI property located in the U.S. The majority of this property consisted of deposit accounts maintained in various U.S. banks by specifically identified BCCI branches and other BCCI entities. Pursuant to §1963(l)(2) of RICO, in March, 1992 Petitioners filed their third-party petition in the U.S. District Court for the District of Columbia, claiming legal interests in the hundreds of millions of dollars of BCCI assets forfeited to the government. Representing subclasses of depositors who deposited funds in those identified branches (or whose deposited funds can otherwise be traced to those accounts) and specifically incorporating by reference the massive (482-

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[3] *In re Bank of Credit and Commerce Int'l Depositors Litig.*, 15 RICO L. Rptr. 1234, 1241-43, 1251 (C.D. Cal. May 20, 1992), *aff'd*, No. 92-56085, 1995 U.S. App. LEXIS 7693 (9th Cir. Apr. 7, 1995) (petition for rehearing and suggestion for rehearing *en banc* filed on Apr. 21, 1995); *see* A-50 to A-55. While the general rule is that a person does not have standing to complain about injury to another, where they are, in fact, also a *target* of a fraudulent scheme, they do have standing under §1964(c) of RICO. *See Holmes v. Securities Investor Protection Corp.*, 503 U.S. 258, 112 S. Ct. 1311, 1320 & n.19 (1992) (brokerage/customer); *GICC Capital Corp. v. Technology Fin. Group*, 30 F.3d 289, 293 (2d Cir. 1994) (debtor/creditor); *Ceribelli v. Elghanayan*, 990 F.2d 62, 64-65 (2d Cir. 1993) (cooperative/owner); *In re EDC*, 930 F.2d 1275, 1279 (7th Cir. 1991) (debtor/creditor); *Ocean Energy II, Inc. v. Alexander & Alexander*, 868 F.2d 740, 743-46 (5th Cir. 1989) (corporation/insurer).

page) amended complaint which they had filed in the *Hamid* Class Action, Petitioners asserted that the various depositor subclasses had been defrauded by BCCI and its insiders. Because their deposited funds were obtained by fraud, under well-developed principles of law, the depositors asserted that they were entitled to imposition of a constructive trust on the forfeited accounts, which interest is superior to BCCI's illegal interest and, therefore, superior to the government's derivative interest obtained only through forfeiture under §1963(l)(6)(A) of RICO.[4] A-6 to A-7. As a result, Petitioners adequately pled both standing, as required by §1963(l)(2), and a protected property interest within the meaning of §1963(l)(6)(A).

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[4] In the court below, the government contended that the validity of Petitioners' constructive trust theory was a matter of federal law; in fact, the issue turns on state (or other) law as it is incorporated into federal law. *See Ocean Energy II*, 868 F.2d at 743-46. In addition, while Petitioners' "right, title, or interest" in the forfeited property was termed a "constructive trust" in the court below, it must just as easily be termed an "equitable lien" or "an action for money had and received" because these claims are traditionally alternative theories of legally recovering money taken by fraud. *See, e.g., Provencher v. Berman*, 699 F.2d 568, 569-70 (1st Cir. 1983) (Breyer, J.) (defendant's fraud gives rise to either an equitable lien or a constructive trust in favor of plaintiff; following Massachusetts law but recognizing this to be the "virtually universal rule"); Joseph Story, *Commentaries on Equity Jurisprudence* §1219 (1st Eng. ed. 1884) ("The principle upon which courts of equity have proceeded in establishing [an equitable] lien, in the nature of a trust is, that a person . . . ought not, in conscience, as between them, be allowed to keep it. . . . "). *Walker v. The Ware, Hadhan & Buntingford Ry. Co.*, 1 Equity Cas. 195, 199 (1865) (equitable lien: "[I]t is said the enforcement of the lien would interfere with the rights of the public [in the railroad]. . . . [B]ut can it be said that a railway company may take a man's land [by condemnation] without paying for it and when he seeks to enforce payment . . . set up as a defense the rights of the public? . . . The public . . . cannot be interested in having a man deprived of his property."). The validity of whichever theory is adopted, however, is not before this Court and must await the statutorily mandated evidentiary hearing in the court below.

2. The District Court's Decision

In its August 19, 1993 decision, after denying Petitioners the evidentiary hearing guaranteed by §1963(l)(2) and (5), the district court summarily dismissed their claims. While recognizing that the beneficiaries of a constructive trust have standing to challenge a forfeiture under §1963(l), the district court nevertheless ruled that the imposition of a constructive trust in favor of the Petitioners would be "inappropriate." A-27.[5]

3. The Court Of Appeals' Decision

On appeal, the District of Columbia Circuit (Silberman, Henderson & Randolph, JJ.) affirmed the district court's decision, although on different grounds. The court of appeals was unpersuaded by the government's attempt to label Petitioner's entitlement to the forfeited funds as "equitable," such that it could not be recognized under §1963(l)(6)(A) as a "*legal* right, title, or interest," A-9 (emphasis added), thus, the court "rejected the notion that Congress intended to draw the ancient, but largely ignored, distinction between technically

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[5] The district court opinion in this case suffered its own unique errors distinct from those of the circuit court's opinion. Rather than simply determining, as required by §1963, whether Petitioners were entitled to a *hearing* to present evidence, and argue their case, the district court ruled directly on the *merits* of the petitions, without allowing Petitioners the opportunity to present evidence. Ignoring the due process concerns that troubled Congress when it enacted §1963, the district court decision stands for the proposition that a court may reject even *adequately pleaded* property claims of innocent third parties without the benefit of a constitutionally adequate hearing, including consideration of a petitioner's evidence and arguments. *See United States v. $38,000.00 in United States Currency*, 816 F.2d 1538, 1547 (11th Cir. 1987) ("the burden on the government to adhere to procedural rules should be heavier than on claimants"); 129 Cong. Rec. 53989 (introduction of S. 948, the Comprehensive Forfeiture Act of 1983) (Sen. Biden) (legislation must "provide for [the] orderly consideration of third party claims, taking into account the requirements of due process").

legal and technically equitable claims in forfeiture challenges." A-10 (citations omitted). Nevertheless, the court of appeals affirmed the summary dismissal of Petitioners' claims to BCCI's forfeited funds, holding that to prevail under §1963(l)(6)(A), the defrauded depositors must establish that their interest had "vested" or was "superior" to BCCI's "at the time" of the commission of the acts (RICO violations) that gave rise to the forfeiture. A-11 (quoting 18 U.S.C. §1963(l)(6)(A)).

The District of Columbia Circuit rejected the reasoning of the Second, Third, Fourth, Sixth and Seventh Circuits, which had previously held that a constructive trust can be interposed as *superior* to the government's forfeiture claim under §1963(l)(6)(A) of RICO, or equivalent criminal forfeiture statutes.[6] The court below reasoned that "[w]hile those courts . . . properly rejected the government's legal/equitable distinction, they did not consider whether a judicially imposed constructive trust would be inconsistent with the statutory remedial scheme." A-12. Thus, Judge Silberman's opinion adopted a distinction not even urged by the government, and construed RICO's forfeiture provision in a manner

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[6] *See, e.g., United States v. Schwimmer*, 968 F.2d 1570, 1582 (2d Cir. 1992) (following decisions from the Third and Fourth Circuits holding that the term "legal" in §1963(l) of RICO "should be interpreted to mean 'under the law' " and following decisions from the Sixth and Seventh Circuits holding that "a constructive trust may be a superior interest under §1963(l)(6)(A)"); *United States v. Lavin*, 942 F.2d 177, 187 (3d Cir. 1991) (same – construing §853(n)(6) of the Comprehensive Drug Abuse Prevention and Control Act of 1970, 21 U.S.C. §853(n)(6)); *United States v. Campos*, 859 F.2d 1233, 1238-39 (6th Cir. 1988) (explicitly stating in *dicta* that a "constructive" trust would qualify as "superior" under §853(n)(6)); *United States v. Marx*, 844 F.2d 1303, 1308 (7th Cir. 1988) (holding that a constructive trust warrants a remission of a forfeiture order under §853(n)(6)(A)); *United States v. Reckmeyer*, 836 F.2d 200, 205 (4th Cir. 1987) (adopting broad view of "legal interest" for purpose of §853(n)(6)); *see also Torres v. $36,256.80 U.S. Currency*, 25 F.3d 1154, 1158-59 (2d Cir. 1994) (same – construing 21 U.S.C. §881). District court decisions are in accord. *See, e.g., County of Oakland v. Vista Disposal*, 826 F. Supp. 218, 223 (E.D. Mich. 1993).

that is clearly inconsistent with basic principles of statutory interpretation mandating the avoidance of unconstitutional constructions of statutes, the intent of Congress reflected in statutory text, this Court's recent interpretation of the common law relation-back doctrine, the considered judgments of sister circuit courts, and centuries of common law jurisprudence establishing well-settled principles governing constructive trusts and related legal doctrines:

> Congress intended that as far as §1963(l)(6)(A) is concerned, a third party's claim is to be measured not as it might appear at the time of litigation, but rather as it existed at the time the illegal acts were committed. A constructive trust is a *remedy* that a court devises after litigation. It is, as we have noted, a fictional trust – not a real one. It could not have been shown to exist at the time the acts were committed. Moreover, Congress provided under §1963(c) of the RICO forfeiture Act that title in all criminally acquired property of the defendant is deemed to "vest[ ] in the United States upon the commission of the act giving rise to forfeiture." Congress, in other words, devised a statutory remedial scheme that reaches *back to the time of the criminal acts* to forfeit the property to the United States. The statute thus creates a retroactive legal fiction similar to a constructive trust for the benefit of the United States. It is not open to a court to fashion another remedy (a competing fiction) that also reaches back to snatch the property away from the United States – which is exactly what a constructive trust would do.

A-11 to A-12 (emphasis in original).

As set forth below, the District of Columbia Circuit's decision in this case is not only in conflict with this Court's recent forfeiture decisions and other circuit court decisions on these important legal issues, but its reasoning misconstrues RICO's statutory language to the detriment of innocent third parties for whose express protection §1963(l) of RICO was added by amendment in 1984. Moreover, the circuit court's

decision permits the government to gain an improper advantage through a plea bargained forfeiture with BCCI, the insolvent perpetrator of a massive financial fraud, that Congress specifically eschewed in the context of basic bankruptcy law.[7]

REASONS FOR GRANTING THE WRIT

Certiorari should be granted because this case presents important issues of first impression in this Court concerning the proper construction and application of §1963(l) of RICO in forfeiture proceedings implicating the rights of innocent third parties. The decision of the District of Columbia Circuit in this case is not only in conflict with previous decisions from the Second, Third, Fourth, Sixth and Seventh Circuits, but it also misconstrues the well-developed common law of constructive trusts. In addition, the decision of the court below ignores basic principles of statutory interpretation that counsel caution when statutes collide with well-settled constitutional doctrines, the pertinent statutory provisions themselves, as well as RICO's salutary purpose: to permit innocent victims, including the hundreds of thousands of BCCI's defrauded depositors, to recover their stolen property from forfeited assets and to enforce provisions of a criminal plea agreement that were expressly intended for their benefit.

This case presents important legal issues involving forfeitures in the context of the second largest forfeiture proceeding in the history of this country.[8] It presents this Court

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[7] Had the government not seized BCCI's assets, but sought to enforce its forfeiture order in a bankruptcy proceeding, its distribution priority would have been *fourth*. 11 U.S.C. §726(a)(4). Unsecured creditors are third. 11 U.S.C. §726(a)(3). *See In re Ryan*, 15 B.R. 514 (Bankr. D. Md. 1981).

[8] The largest civil forfeiture action was junk bond king (and convicted felon) Michael Milken's forfeiture of $900 million to the Securities and Exchange Commission. *See* Thomas J. Lueck, *Port Jefferson Auto Dealer Forfeits Most of His Assets*, N.Y. Times, May 20, 1992, at B1, B5.

with an opportunity, consistent with its decisions in the complex area of forfeiture law,[9] to address yet another inequity[10]

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[9] In several recent forfeiture cases, this Court has taken the government to task for its overzealous and unfair enforcement of federal statutes allowing forfeiture of assets. *See, e.g., United States v. James Daniel Good Real Property*, ___ U.S. ___, 114 S. Ct. 492, 505 (1993) (holding that the Due Process Clause requires the government to afford notice and an opportunity to be heard before seizing real property subject to civil forfeiture); *Austin v. United States*, ___ U.S. ___, 113 S. Ct. 2801, 2803 (1993) (looking past guilty-property fiction and holding that civil forfeitures may constitute Excessive Fines under the Eighth Amendment); *United States v. 92 Buena Vista Ave.*, ___ U.S. ___, 113 S. Ct. 1126, 1135-36 (1993) (plurality opinion holding that donees and other post-illegal act transferees of forfeitable property may claim protection under the "innocent owner" defense); *Republic Nat'l Bank v. United States*, ___ U.S. ___, 113 S. Ct. 554, 562 (1992) (government cannot deprive the appellate court of jurisdiction by transferring forfeited property out of judicial district). *Cf. Department of Revenue v. Kurth Ranch*, ___ U.S. ___, 114 S. Ct. 1937, 1945 (1994) ("A defendant convicted and punished for an offense may not have a nonremedial civil penalty imposed against him for the same offense in a separate proceeding.") (citation omitted). *See also United States v. Libretti*, 38 F.3d 523 (10th Cir. 1994) (right to jury trial in forfeiture proceeding extends to guilty plea), *cert. granted*, No. 94-7427, 1995 U.S. LEXIS 2258 (Mar. 27, 1995).

[10] In the words of one respected commentator on the law of civil and criminal forfeitures:

> The government's overzealous forfeiture efforts are being criticized by the courts, the media, legal commentators, bar associations, civil liberties organizations, some members of Congress, and even by the prosecutors responsible for leading and directing the federal forfeiture program. We are witnessing a major swing of the law enforcement pendulum. After years of relentless expansion, our forfeiture laws are in for a long overdue review by the courts, legislatures and the Clinton Department of Justice. There is a widely perceived need to reform these laws and the way they are being implemented to make them fairer and to prevent the kinds of abuses that have occurred.

1 David B. Smith, *Prosecution and Defense of Forfeiture Cases*, ¶1.02, at 1-19 (1985 & Supp. 1994). *See also James Daniel Good Real Property*,

in the construction and administration of such statutes.[11]

I. THIS CASE PRESENTS IMPORTANT QUESTIONS OF LAW CONCERNING INNOCENT THIRD PARTIES' RIGHTS IN RICO FORFEITURE CASES AND REVIEW BY THIS COURT IS NECESSARY TO RESOLVE A SPLIT IN THE CIRCUITS AS TO THE PROPER CONSTRUCTION AND APPLICATION OF SECTION 1963(l)(6)(A) OF RICO

A. The Purpose And Construction Of Section 1963(l) Of RICO

This case represents the first instance in which this Court will construe and apply §1963(l) of RICO, which governs innocent victims' (and other third parties') rights in criminal forfeiture

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114 S. Ct. at 515 (Thomas, J., concurring in part, dissenting in part); *United States v. $191,910.00 in U.S. Currency*, 16 F.3d 1051, 1068-69 (9th Cir. 1994); *United States v. All Assets of Statewide Auto Parts, Inc.*, 971 F.2d 896, 905 (2d Cir. 1992); Steven L. Schwarcz & Alan E. Rothman, *Civil Forfeiture: A Higher Form of Commercial Law?*, 62 Fordham L. Rev. 287 (1993).

[11] Currently, forfeiture is authorized by more than 100 federal statutes providing for confiscation of everything from diseased poultry, *see* 21 U.S.C. §467b(a), to pornographic magazines, *see* 18 U.S.C. §1466. Examples of non-drug related civil forfeiture statutes include 18 U.S.C. §981 (forfeiture of any property involved in illegal money laundering transactions); 18 U.S.C. §512 (forfeiture of vehicles that have removed, obliterated, or altered identification numbers); 18 U.S.C. §1955(d) (forfeiture of any property used in conducting an illegal gambling business); 18 U.S.C. §2254 (forfeiture of objects depicting minors engaged in sexually explicit conduct). Additionally, a number of criminal forfeiture statutes are codified in various titles of the U.S. Code, including RICO, *see* 18 U.S.C. §1963. *See generally* Comment, *RICO Forfeiture: Secured Lenders Beware*, 37 UCLA L. Rev. 1199, 1204 & n.26 (1990) ("Comment, *RICO Forfeiture*") (collecting federal statutes).

The distinction between civil and criminal forfeiture is historical. "Upon this point a page of history is worth a volume of logic." *New York Trust Co. v. Eisner*, 256 U.S. 345, 349 (1921) (Holmes, J.). In essence, civil forfeiture is an *in rem* proceeding against the property, while criminal

proceedings instituted by the government.[12] Although RICO was enacted in 1970, prior to 1984, third parties (such as Petitioners) were not statutorily entitled to challenge criminal forfeitures arising under §1963 of the statute. *Reckmeyer*, 836 F.2d at 207; *United States v. L'Hoste*, 609 F.2d 796, 812 (5th Cir.), *cert. denied*, 449 U.S. 833 (1980).[13] Thus, where the property of an innocent third

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forfeiture is an *in personam* proceeding against the defendant in which forfeiture of the property is imposed as a penalty. Forfeiture constitutes a significant source of government revenues and, since 1985, the Asset Forfeiture Fund of the Department of Justice has recovered $3.5 billion. *See Departments of Commerce, Justice and State, the Judiciary and Related Agencies Appropriations for 1995, Hearings Before the House Subcomm. on Appropriations*, 103rd Cong., 2d Sess. 781 (1994) (testimony of Dep. Atty. Gen. Cary H. Copeland).

[12] RICO mandates forfeiture of all assets a defendant has acquired through a pattern of racketeering activity. Section 1963(a) directs that any person who acquires, controls, or conducts the affairs of an enterprise through a pattern of racketeering activity or the collection of an unlawful debt shall forfeit to the government any interest acquired through racketeering, any property right affording a source of influence over a RICO enterprise, and any property constituting proceeds of racketeering activity. *See Alexander v. United States*, ___ U.S. ___, 113 S. Ct. 2766 (1993); *United States v. Monsanto*, 491 U.S. 600 (1989); *see also Russello v. United States*, 464 U.S. 16, 21 (1983) (the term "interest" in §1963(a)(1) includes profits and proceeds). Thus, criminal *in personam* forfeiture under RICO has several interrelated purposes. First, it deprives the racketeer of property acquired through any illegal activity on the theory that a person should not be allowed to profit from crime. Comment, *RICO Forfeiture*, 37 UCLA L. Rev. at 1207. Second, by separating a RICO violator from ill-gotten gains, forfeiture prevents the violator both from delegating criminal activities to a colleague while in prison and from resuming the activities once the violator has served his sentence. *See* Senate Committee on the Judiciary, *Organized Crime Control Act of 1969*, S. Rep. No. 617, 91st Cong., 1st Sess. 80 (1969). Third, *in personam* forfeiture provides the government with revenue to be used in its fight against crime. *Caplin & Drysdale v. United States*, 491 U.S. 617, 629 (1989).

[13] In 1983, Congress recognized the historical roots of criminal forfeiture in the English common law, *see* S. Rep. No. 225, 98th Cong., 2d Sess. 193 (1983), *reprinted in* 1984 U.S. Code Cong. & Admin. News

party was ordered forfeited to the government in a RICO case, that party's only remedy was to petition the Attorney General for relief, as the court of appeals recognized in this case. A-9; *see also Lavin*, 942 F.2d at 185; *United States v. Delco Wire & Cable Co.*, 772 F. Supp. 1511, 1515-16 (E.D. Pa. 1991). The Attorney General's decision to grant or deny relief was entirely discretionary and was not subject to judicial review. *Id.*; *see also L'Hoste*, 609 F.2d at 812.

This procedure raised due process concerns in the Congress and among the bar as to the court's power to exercise jurisdiction over property that belonged to a party not before the court, particularly property belonging to an innocent party not subject to criminal indictment.[14] Recognizing that a third party has a due

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3182, 3376 ("S. Rep. No. 225") ("criminal forfeiture . . . has its origins in ancient English common law"), but traditionally it was disfavored in this country. *United States v. Cauble*, 706 F.2d 1322, 1345 & nn. 84-85 (5th Cir. 1983), *cert. denied*, 465 U.S. 1005 (1984). The RICO forfeiture provision, codified as 18 U.S.C. §1963, is the second piece of criminal forfeiture law that Congress has authorized. *Id.* Subsequently, but in the same year when RICO was passed, Congress provided a similar criminal forfeiture mechanism in the Continuing Criminal Enterprise Act ("CCE"), codified as and amended at 21 U.S.C. §§848, 853, to combat drug trafficking. *See United States v. Pelullo*, 14 F.3d 881, 902 (3d Cir. 1994).

[14] Petitioners were not parties to the criminal proceeding in which BCCI pled guilty to RICO violations. In the words of this Court, "[i]t is elementary that one is not bound by a judgment *in personam* resulting from litigation in which he is not designated as a party or to which he has not been made a party by service of process." *Zenith Radio Corp. v. Hazeltine Research*, 395 U.S. 100, 110 (1969); *see also United States v. Kramer*, 912 F.2d 1257, 1261 (11th Cir. 1990) (third parties are not bound by criminal *in personam* forfeiture verdicts). To extinguish Petitioners' legal rights required not only notice and a hearing, but appropriate procedural protections. Because the government seized BCCI's property, the proceedings were not like a bill of peace, which is equitable in character, but like an action for ejectment, which is legal in character; accordingly, Petitioners were entitled to a jury trial under the Seventh Amendment. *Compare Chauffeurs Teamsters & Helpers, Local No. 391 v. Terry*, 494 U.S. 558, 565 (1990) (Seventh Amendment right to jury trial governed by history and nature of remedy sought) *with Humble Oil & Refining Co. v. Sun Oil Co.*,

process right to protect its property, Congress acted to correct this statutory failing and, in 1984, it amended §1963 of RICO to provide for an evidentiary hearing at which a party could establish the validity of its interest in such property.[15] *See* A-10 to A-11

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191 F.2d 705, 717-21 (5th Cir. 1951) (ejectment and bill of peace in possession and out of possession compared), *cert. denied*, 342 U.S. 920 (1952). Even *in rem* forfeitures may impose jury trial obligations. *See United States v. One 1976 Mercedes Benz*, 618 F.2d 453, 456-58 (7th Cir. 1980) (if personalty is seized on land, a jury trial is required).

Statutes should be construed under well-settled rules of interpretation in order to avoid constitutional issues. *New York v. United States*, ___ U.S. ___, 112 S. Ct. 2408, 2425 (1992). Thus, §1963 of RICO ought not to be read to deprive an innocent party of its interest in property without notice, hearing, or other procedural protection. In *Peisch v. Ware*, 8 U.S. (4 Cranch.) 347 (1808), where the removal of the goods from the custody of the revenue officer occurred not by theft or robbery but pursuant to a writ of replevin issued by a state court, *id.* at 360, Chief Justice Marshall construed a civil *in rem* forfeiture statute to protect basic property rights, pertinently stating that "[i]f, by private theft, or open robbery, without any fault on his part, his property should be invaded . . . the law cannot be understood to punish him with the forfeiture of that property." *Id.* at 364. Thus, *Peisch* stands for the general principle that "the law is not understood to forfeit the property of owners or consignees, on account of the misconduct of mere strangers, over whom such owners or consignees could have no control." *Id.* at 365. Here, too, this Court should read RICO to protect – not violate – third party rights. *See Austin*, 113 S. Ct. at 2809 (question "expressly reserved" whether "truly innocent owner's" rights could be forfeited *in rem*) (citing *J. W. Goldsmith-Grant Co. v. United States*, 254 U.S. 505, 512 (1921), and *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 689-90 (1974)). The Constitution requires more – not fewer – rights when a forfeiture proceeding is *in personam*.

[15] In 1984, Congress enacted the Comprehensive Forfeiture Act of 1984, Pub. L. 98-473, Title II, Ch. III, 98 Stat. 2040, to amend the RICO and CCE forfeiture provisions. *See Pelullo*, 14 F.3d at 902. With respect to RICO's forfeiture provisions, §302 of the act added a subsection to §1963 (now subsection (l)) in order to provide for ancillary proceedings for third parties to claim any interest in the forfeited property and to specify that third parties have the burden to prove their interest by a mere preponderance of the evidence. 98 Stat. 2043-44; *see also Pelullo*, 14 F.3d at 902. The statutory amendment also guaranteed an evidentiary hearing, *see* 18

("[§]1963(l) was added to alleviate due process concerns; obviously, only the property of the defendant (including property held by a third party pursuant to a voidable transaction) can be confiscated in a RICO proceeding.") (citing S. Rep. No. 225 at 208, *reprinted in* 1984 U.S. Code Cong. & Admin. News at 3391);[16] *see also Kramer*, 912 F.2d at 1260; *Reckmeyer*, 836 F.2d at 207; *County of Oakland*, 826 F. Supp. at 222.

Thus, in subsections (A) and (B) of §1963(l)(6), Congress afforded two categories of third parties standing to petition the courts to determine the validity of their claims to forfeited assets. Standing to petition exists

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U.S.C. §1963(l)(5), which, as noted above, the district court denied to Petitioners in this case.

[16] In discussing proposed §1963(l), the Senate Judiciary Committee noted that the Department of Justice had changed its position on the propriety of the remission and mitigation proceedings as the only source of relief for third parties whose property interests were compromised by an *in personam* forfeiture order and expressed its view that such third parties were entitled to judicial review of their claims:

> Criminal forfeiture is an *in personam* proceeding. Thus, an order of forfeiture may reach only property of the defendant, save in those instances where a transfer to a third party is voidable. Thus, if a third party can demonstrate that his interest in the forfeited property is exclusive of or superior to the interest of the defendant, the third party's claim renders that portion of the order of forfeiture reaching his interests invalid. The Committee strongly agrees with the Department of Justice that such third parties are entitled to judicial resolution of their claims.

S. Rep. No. 225 at 208, *reprinted in* 1984 U.S. Code Cong. & Admin. News 3391; *see also Schwimmer*, 968 F.2d at 1580; *Reckmeyer*, 836 F.2d at 207-08; Hearings Before the Subcommittee on Crime of Committee on the Judiciary, House of Representatives, 98th Cong., 1st Sess., on H.R. 3272, H.R. 3299, and H.R. 3725, Comprehensive Drug Penalty Act, 4-16, 15 (1983) (testimony of James Knapp, Dep. Ass't Atty. Gen., Criminal Division, suggesting that judicial resolution is appropriate for third parties whose interests are "by their very nature inconsistent with the order of forfeiture").

> first, where the petitioner had a legal interest in the property that, at the time of the commission of the acts giving rise to the forfeiture, was vested in him rather than the defendant or was superior to the interest of the defendant; or second, where the petitioner acquired his legal interest after the acts giving rise to the forfeiture but did so in the context of a *bona fide* purchase for value and had no reason to believe that the property was subject to forfeiture.

S. Rep. No. 225 at 209, *reprinted in* 1984 U.S. Code Cong. & Admin. News at 3392. According to the Third Circuit, "Congress derived both exceptions essentially from hornbook commercial law." *Lavin*, 942 F.2d at 185. The first exception, codified in §1963(l)(6)(A), reflects the common law principle, embodied in the venerable maxim *nemo dat qui non habet*,[17] that a buyer acquires no better title than that of the seller. *Id.* Under the so-called "relation-back" doctrine utilized in criminal forfeiture cases, *see 92 Buena Vista Ave.*, 113 S. Ct. at 1135-36 (plurality op.), the government asserts that it acquired its interest in the defendant's forfeited property at the time of the commission of the criminal acts giving rise to the forfeiture order. *See* A-4. Nevertheless, "if a third party's interest in the forfeited property, at the time of the criminal acts, was superior to the criminal defendant's interest, then the interest that the government acquires when it steps into the defendant's shoes is subordinate to that of the third party." *Lavin*, 942 F.2d at 185. *Accord County of Oakland*, 826 F. Supp. at 223-24.

While the District of Columbia Circuit acknowledged this exception to the relation-back doctrine (while simultaneously ignoring the severe limitations on the doctrine imposed by this Court in *92 Buena Vista Ave.*, 113 S. Ct. at 1135-36), *see* A-11, it grossly mischaracterized the nature of a constructive trust – the right, title, or interest asserted by Petitioners – when it wrongly stated that "[i]t could not have been shown to exist at the time the [illegal] acts were committed" by BCCI. A-12. Under well-settled law, Petitioners' constructive trust (or equitable lien) came into

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[17] "He who hath not cannot give." *Black's Law Dictionary* 1037 (6th ed. 1990).

existence when they were defrauded into depositing their money into BCCI, a criminal enterprise. As such, their right, title, or interest in BCCI's forfeited property would *always* be superior to whatever derivative interest the government acquired when BCCI *subsequently* used Petitioners' deposits – in some cases, years later – to finance criminal acts, such as illegally infiltrating U.S. financial institutions, which predicate acts furnished the basis for BCCI's 1992 RICO guilty plea and the forfeiture order at issue here.

B. The Constructive Trust Asserted By Petitioners In BCCI's Forfeited Funds Is A Legal Interest That Is Superior To The Criminal Defendant's Right, Title, Or Interest Therein And, Therefore, It Is Superior To The Government's Derivative Interest

After discussing the metaphysical differences between "legal" and "equitable" interests, *see* A-8 to A-10, the court of appeals stated that "we agree with our sister circuits that have rejected the notion that Congress intended to draw the ancient, but largely ignored, distinction between technically legal and technically equitable claims in forfeiture challenges," A-10 (citing *Schwimmer*, 968 F.2d at 1582; *Lavin*, 942 F.2d at 185 n.10; and *Campos*, 859 F.2d at 1238-39), because "[i]t seems to us that it would just as much offend notions of due process for the government to scoop up property in which a third party has certain kinds of equitable interests as it would for the government to take property in which a third party has a 'legal' interest" and "focusing on the distinction between equitable and legal interests obscures Congress' real intent." A-11. Nevertheless, while the court below acknowledged that the constructive trust asserted by Petitioners over BCCI's forfeited funds is a "legal right, title, or interest" clearly intended by Congress to be protected under §1963(l)(6)(A), it misconstrued the indisputable character of a constructive trust (or an equitable lien) and RICO's language and statutory purpose in holding that Petitioner's interest in BCCI's forfeited assets had not "vested" or was not "superior" to BCCI's interest therein when BCCI committed the criminal acts which gave rise to the 1992 RICO guilty plea and forfeiture order. A-11 to A-12.

To prevail under §1963(l)(6)(A), Petitioners must assert an interest in the forfeited funds that is *superior* to BCCI's interest at the time of the commission of its RICO predicate acts; however, in the words of the Sixth Circuit, "[s]uch a *superior* interest would clearly be one in the nature of a *lien*, mortgage, recorded security device, *constructive trust*, valid assignment, or the like." *Campos*, 859 F.2d at 1238-39 (later emphasis added). *Accord Marx*, 844 F.2d at 1307-08 (holding that a constructive trust warrants a remission under 21 U.S.C. §853(n)(6)(A)); *Schwimmer*, 968 F.2d at 1581-82 (following *Campos* and *Marx* and holding that "a constructive trust may be a superior interest under §1963(l)(6)(A)"); *County of Oakland*, 826 F. Supp. at 223 ("A constructive trust is superior to the possessory interest of the wrongdoer.") (citations omitted).[18] Refusing to follow this persuasive authority from other

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[18] Under well-settled authority that the District of Columbia Circuit ignored, when Petitioners were fraudulently induced to deposit their money into BCCI, such assets (like funds which have been embezzled or misappropriated) were obtained by wrongful means and, therefore, could not properly be considered BCCI's property. Consequently, BCCI held no legal title to these funds from the time they were deposited and in fact, held them subject to an equitable lien or as a constructive trustee in favor of Petitioners. *See SEC v. Paige*, 1985 Westlaw 2335, 1985 U.S. Tax Cas. (CCH) ¶9588, at 89,506 (D.D.C. July 30, 1985) (under general rule of common law the victim, and not the embezzler, retains title to funds), *aff'd*, 810 F.2d 307 (D.C. Cir. 1987); *United States v. Fontana*, 528 F. Supp. 137, 143 (S.D.N.Y. 1981) (same). Thus, BCCI never had property interests in the stolen money that could be forfeited to the government under RICO. *See SEC v. Levine*, 689 F. Supp. 317, 321-22 (S.D.N.Y. 1988), *aff'd in part and rev'd in part on other grounds*, 881 F.2d 1165 (2d Cir. 1989). In the words of Judge Gadola:

> [I]f it is determined that the forfeited property is in part or whole, traceable to the injury suffered by Oakland County as a victim of the RICO conspiracy, then Vista cannot be said to ever have held title to the property. Vista will be found merely to have held the property in trust for Oakland County. Therefore, Oakland County's interest in that part of the forfeited property traceable to Oakland County's injury as a victim has always been superior to Vista's interest.

County of Oakland, 826 F. Supp. at 223 (footnote omitted).

circuits, *see* A-12, the District of Columbia Circuit grossly mischaracterized the constructive trust asserted by Petitioners, stating in pertinent part that "[a] constructive trust is a *remedy* that a court devises after litigation. It is, as we have noted, a fictional trust – not a real one. *It could not have been shown to exist at the time the acts were committed*" by BCCI. *Id.* (later emphasis added).

Constructive trusts and equitable liens are long-recognized features of common law jurisprudence whose characteristics are beyond dispute. *See Moore v. Crawford*, 130 U.S. 122, 128 (1889). Speaking for the New York Court of Appeals, Justice Cardozo stated that "[a] constructive trust is the formula through which the conscience of equity finds expression. When property has been acquired in such circumstances that the holder of the legal title may not in good conscience retain the beneficial interest, equity converts him into a trustee." *Beatty v. Guggenheim Exploration Co.*, 225 N.Y. 380, 386, 122 N.E. 378, 380 (1919). Thus, "[a] court of equity may prevent the unjust enrichment of a defendant by compelling him to surrender to the plaintiff property held by him, thus enforcing a constructive trust, or by giving the plaintiff a security interest in the property held by the defendant, thus imposing an equitable lien." V Austin Wakeman Scott & William Franklin Fratcher, *The Law of Trusts* §463, at 331 (4th ed. 1989) ("V Scott, *Law of Trusts*") (footnote and citations omitted); *see also In re Lela & Co.*, 551 F.2d 399, 406-07 (D.C. Cir. 1977).[19] Property (such as Petitioners' deposits) obtained by fraud presents the classic case for

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[19] Similar definitions have been expressed for centuries by the English courts, where the constructive trust and equitable lien were conceived, *see, e.g., Hussey v. Palmer*, 3 All E.R. 744, 747, 1 W.L.R. 1286 (1972); *McCormick v. Grogan*, 4 L.R.-E. & I. App. 82, 88, 97 (1869); *Rolfe v. Gregory*, 4 De G.J.&S. 576, 579 (1864), as well as by the Restatements. *See Restatement (Second) of Trusts*, §1, comment e (1959); *Restatement of Restitution* §160 (1937). *See generally* I George E. Palmer, *The Law of Restitution* §1.3, at 9-16, §1.5(a), at 20-21 (1989) (tracing the history of constructive trusts and equitable liens in England and the U.S.) ("I Palmer, *Restitution*").

imposition of a constructive trust: "[T]he acquisition of property through the fraudulent misrepresentation of a material fact has been held sufficient grounds to fasten a constructive trust on the property." *Osin v. Johnson*, 243 F.2d 653, 656 (D.C. Cir. 1957) (citation omitted); *see also Old Security Life Ins. Co. v. Continental Ill. Nat'l Bank & Trust Co.*, 740 F.2d 1384, 1397 (7th Cir. 1984); *China Fire Ins. Co. v. Davis*, 50 F.2d 389, 391 (2d Cir.) (L. Hand, J.), *cert. denied*, 284 U.S. 658 (1931). *See generally* V Scott, *Law of Trusts* §462, at 302; I Palmer, *Restitution* §§3.2-3.3, at 232-37.[20]

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[20] Imposition of a constructive trust or equitable lien is particularly appropriate where (as here) the depositors allege that they were fraudulently induced to deposit their money into BCCI, a phony bank:

> *Even in the case of a general deposit, a bank becomes constructive trustee of the money deposited if it is guilty of fraud in obtaining the deposit.* The most common instance of such fraud occurs where the bank continues to receive deposits when it has, to the knowledge of its officers, become hopelessly insolvent. A person when he borrows money does not necessarily make any representation thereby that he is solvent. A bank, however, as long as it continues to receive deposits does in effect make a representation that it is, as far as is known to its officers, a solvent concern; when it ceases to be so it should close its doors. It is, indeed, frequently made a criminal offense on the part of its officers for the bank to continue to receive deposits when it is known by them to be insolvent. *Accordingly it has been held that a bank that receives deposits when it knows that it is hopelessly insolvent becomes a constructive trustee of the money deposited, and the depositor is entitled to priority over the general creditors of the bank,* provided that it can identify the money deposited or trace it into the assets of the bank.

V Scott, *Law of Trusts* §529, at 690-61 (emphasis added; footnote omitted). This rule has been followed in this country for over a century. *See, e.g., St. Louis & S.F.R. v. Johnston*, 133 U.S. 566 (1890); I Palmer, *Restitution* §1.5(a), at 21 ("One of the significant effects of both constructive trust and equitable lien is to give priority over the claims of general creditors when a claimant's funds are traced into the assets of an insolvent estate.").

In this case, Petitioners alleged with requisite particularity that the money they deposited in BCCI was obtained by fraud,[21] thus, they properly alleged the foundation for imposition of a constructive trust or equitable lien. But the court below engaged in its own legal fiction when it held that Petitioners' constructive trust did not arise *until* their third-party petitions were filed in the district court under §1963(l) of RICO, *see* A-11 to A-12, *when the law is clear that the constructive trust or the equitable lien arose when they were fraudulently induced to deposit their money in the BCCI banks*. The court below cited no authority in support of its conclusion that the constructive trust or equitable lien asserted by Petitioners over BCCI's funds "could not have been shown to exist at the time the [illegal] acts were committed" by BCCI. A-12. With good reason – *there is no legal authority to support the position taken by the court below in this case* and, in fact, the well-settled common law rule is to the contrary:

> *Where the title to property is acquired by one person under such circumstances that he is under a duty to surrender it, a constructive trust immediately arises.*
>
> * * *
>
> There is no doubt that where the title to property is wrongfully acquired under such circumstances

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[21] As noted above, the amended complaint filed in the *Hamid* Class Action, which was incorporated by reference in Petitioners' §1963(l) petitions filed in the district court, detailed numerous fraudulent misrepresentations that induced depositors worldwide to place their money into BCCI accounts. Such fraudulent statements included generalized misrepresentations, such as those contained in financial statements and other published reports, as well as BCCI brochures which directly targeted potential depositors. In the courts below, the government conceded – and the district court and court of appeals assumed – that Petitioners' multi-billion dollar deposits in the BCCI banks were obtained by fraud. *See* A-40 to A-42.

> that the person acquiring it is under a duty to make restitution, the person entitled to restitution has such an interest in the property as to enable him to recover it from a person to whom the wrong-doer has transferred it, if that person is not a bona fide purchaser. This is true although the transfer is made before the person who was wronged has brought a proceeding to recover the property and long before the court has decreed restitution. *The beneficial interest in the property is from the beginning in the person who has been wronged. The constructive trust arises from the situation in which he is entitled to the remedy of restitution, and it arises as soon as that situation is created.* For this reason, the person who is wronged is entitled to specific restitution from the wrongdoer even though the wrongdoer becomes insolvent before suit is brought, and he is entitled to specific restitution from a person to whom the wrongdoer has transferred the property, if the transferee is not a bona fide purchaser, even though the transfer is made before suit is brought for restitution. *It would seem that there is no foundation whatever for the notion that a constructive trust does not arise until it is decreed by a court. It arises when the duty to make restitution arises, not when that duty is subsequently enforced.*

V Scott, *Law of Trusts* §462.4, at 322, 323-24 (emphasis added; footnote and citations omitted).[22]

The District of Columbia Circuit's mischaracterization of a constructive trust also places it in conflict with its sister circuits, which have uniformly held (usually in the bankruptcy context) that *a constructive trust arises when the*

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[22] The Second Circuit explicitly followed this treatise in *Schwimmer*, 968 F.2d at 1584, when it recognized that third parties' constructive trust may be superior to the government's interest under §1963(l)(6)(A) and remanded the case to the district court of a tracing inquiry.

fraudulent acts (here, the wrongful inducement of Petitioners' deposits) are committed. See, e.g., Chiu v. Wong, 16 F.3d 306, 310 (8th Cir. 1994) (applying Minnesota law) ("The right to a constructive trust arose at the time of the wrongful conversion.") (citation omitted).[23] Thus, the court below distorted the law when it characterized Petitioners' constructive trust as "a retroactive legal fiction" and it ignored well-settled authority when it opined that a constructive trust "reaches back to snatch the [forfeited] property away from" the government. A-12. It ignored (or distorted) precedent and disregarded the pertinent statutory language to deny Petitioners the rights guaranteed to them under §1963(l)(6)(A) of RICO.

In its reliance on the "relation-back" doctrine, the District of Columbia Circuit also ignored this Court's recent decision in *92 Buena Vista Ave.*, which granted the protection of the "innocent owner" defense to the donees of forfeitable property and held that the government may no longer utilize the doctrine to deprive donees and post-illegal act transferees the opportunity to raise the innocent owner defense. 113 S. Ct. at 1135-36. This Court essentially held that the relation-back doctrine vests ownership of forfeitable property in the government *only* after the entry of a final order of forfeiture, rather than vesting title in the government at the moment of the illegal acts, *id.*, but the court below missed this critical

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[23] *Accord Mitsubishi Int'l Corp. v. Cardinal Textile Sales*, 14 F.3d 1507, 1518 (11th Cir. 1994), *cert. denied*, ___ U.S. ___, 115 S. Ct. 1092 (1995); *Hanson v. FDIC*, 13 F.3d 1247, 1253 (8th Cir. 1994); *United States v. Holzer*, 840 F.2d 1343, 1347 (7th Cir.), *cert. denied*, 486 U.S. 1035 (1988); *Capital Investors Co. v. Executors of Estate of Morrison*, 800 F.2d 424, 427 n.5 (4th Cir. 1986); *Levine*, 689 F. Supp. at 321-22; *In re General Coffee Corp.*, 64 B.R. 702, 707 (S.D. Fla. 1986), *aff'd*, 828 F.2d 699 (11th Cir. 1987), *cert. denied*, 485 U.S. 1007 (1988); *Fontana*, 528 F. Supp. at 146.

distinction in its wholesale (and wrongful) application of the relation-back doctrine to defeat Petitioners' claims.

The court below utilized the so-called "relation-back" doctrine to trump Petitioners' constructive trust claim, stating that when it enacted RICO, "Congress . . . devised a statutory remedial scheme that reaches *back to the time of the criminal acts* to forfeit the property to the United States." A-12 (emphasis in original). RICO provides that the government's title vests "upon the commission of the act giving rise to the forfeiture," 18 U.S.C. §1963(c), that is, when the RICO defendant commits the predicate acts of racketeering. *See* Comment, *RICO Forfeiture*, 37 UCLA L. Rev. at 1214; *United States v. One Parcel of Real Estate Property*, 660 F. Supp. 483, 487 (S.D. Miss.), *aff'd on other grounds*, 831 F.2d 566 (5th Cir. 1987); Note, *Tempering the Relation-Back Doctrine: A More Reasonable Approach to Civil Forfeiture in Drug Cases*, 76 Va. L. Rev. 165, 176 (1990) ("Note, *Tempering the Relation-Back Doctrine*"). In its haste to reject Petitioners' meritorious claims to BCCI's forfeited funds, however, the District of Columbia Circuit forgot that BCCI pled guilty in 1992 to predicate acts and resulting RICO violations arising out of its infiltration of U.S. banks, *not* its fraudulent inducement of Petitioners' deposits, which in many cases occurred years earlier. *See* A-3 to A-4.

In *In re Metmor Fin., Inc.*, 819 F.2d 446 (4th Cir. 1987), the Fourth Circuit held that because the lienholder's interest arose *before* the illegal activity, the title that vested in the government was already encumbered. Relying on this Court's decision in *United States v. Stowell*, 133 U.S. 1 (1890), where the plaintiff had obtained a mortgage interest in the property *before* any illegality occurred, *id.* at 19, and this Court held that "the mortgage is valid as against the United States," *id.* at 20, Judge Winter emphasized that "the government can succeed to no greater interest in the property than that which belonged to the wrongdoer whose actions have justified the seizure". *Metmor Fin.*, 819 F.2d at 448-49. *See also* Note, *Tempering the Relation-Back Doctrine*, 76 Va. L. Rev. at 177 (same).

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted in this case.

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United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued November 23, 1994 Decided February 14, 1995

No. 93-5296

UNITED STATES OF AMERICA,
PLAINTIFF-APPELLEE

V.

BCCI HOLDINGS (LUXEMBOURG), S.A., BANK OF CREDIT AND COMMERCE INTERNATIONAL, S.A., BANK OF CREDIT AND COMMERCE INTERNATIONAL (OVERSEAS) LIMITED, AND INTERNATIONAL CREDIT AND INVESTMENT COMPANY (OVERSEAS) LIMITED, DEFENDANTS-APPELLEES

SHRICHAND CHAWLA, LEO D. CURRAN, WILLY HERMANS, AND RED CIRCLE INVESTMENT, LTD., JALEH KHORASSANCHY, AMIT PANDYA, SOHA, INC., IDRISS DEVCO, INC., AND S&L GENTRADE, INC. CLAIMANT-APPELLANTS

No. 93-5299

UNITED STATES OF AMERICA,
PLAINTIFF-APPELLEE

V.

BCCI HOLDINGS (LUXEMBOURG), S.A., BANK OF CREDIT AND COMMERCE INTERNATIONAL, S.A. BANK OF CREDIT AND COMMERCE INTERNATIONAL (OVERSEAS) LIMITED, AND INTERNATIONAL CREDIT AND INVESTMENT COMPANY (OVERSEAS) LIMITED, DEFENDANTS-APPELLEES RAYMOND DAVIES, AS

CONSERVATOR FOR THE BRANCH IN SIERRA LEONE OF BANK OF CREDIT AND COMMERCE INTERNATIONAL (OVERSEAS) LIMITED, CLAIMANT-APPELLANT

Appeal from the United States District Court
for the District of Columbia
(91cv0655)

Before: SILBERMAN, HENDERSON, AND RANDOLPH, *Circuit Judges*

Opinion for the Court filed by *Circuit Judge* SILBERMAN.

SILBERMAN, *Circuit Judge:* Appellants petitioned the district court to amend various court orders forfeiting assets of the Bank of Credit and Commerce International (BCCI) pursuant to the Racketeering and Corrupt Organizations Act, 18 U.S.C. §§ 1961-1968 (1988 & Supp. V 1993). The petitions were dismissed. We affirm on the grounds that appellants' claims of entitlement to the funds in question are not cognizable under the forfeiture provisions of the RICO Act.

I.

In July, 1991, bank regulators in several countries jointly seized and shut down the operations of the four principal financial institutions that collectively made up the enterprise known as BCCI.[1] These measures,

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[1] These four organizations were BCCI Holdings (Luxembourg), S.A., Bank of Credit and Commerce International

prompted by evidence of insolvency and extensive dealings in criminal affairs, were followed by the appointment of fiduciaries for BCCI by courts in Luxembourg and the Cayman Islands, the jurisdictions in which the principal entities were incorporated. A worldwide effort was then begun to consolidate all BCCI assets wherever located for a general global distribution to creditors and depositors.

BCCI's collapse prompted a flurry of civil and criminal investigations by various state and federal agencies in the United States, and criminal charges were brought against BCCI in several jurisdictions. Negotiations between law-enforcement officials and the court-appointed BCCI fiduciaries ultimately led to a comprehensive plea agreement filed with the federal district court in the District of Columbia. The agreement required BCCI to plead guilty to several state and federal criminal and civil charges, including RICO violations, and to forfeit to the Justice Department all BCCI assets located in the United States. It also provided, pursuant to the RICO statute, that half of all sums recovered by the government would be surrendered to the global liquidation fund; the other half was to be reserved for the Attorney General's discretionary allocation among several enumerated purposes, which included offsetting losses to "the Bank Insurance Fund of the FDIC and United States taxpayers" resulting

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(Luxembourg), S.A., Bank of Credit and Commerce International (Overseas) Limited, and International Credit and Investment Company (Overseas) Limited. At the time of the shutdown, these BCCI companies had operations in 69 countries worldwide.

from BCCI's collapse and making further contributions to the global liquidation fund. The plea agreement, with its forfeiture provision, was approved by supervising courts in Luxembourg and the Cayman Islands.

The agreement was opposed, however, by various third parties with claims against BCCI, who saw that a total forfeiture of BCCI's U.S. assets would undermine their independent efforts at recovery. Dissatisfied with the prospect of a heavily discounted distribution from the global liquidation fund, these parties sought to block the plea agreement. In bankruptcy proceedings in New York, putative tort creditors unsuccessfully tried to have the district court in D.C. enjoined from accepting the agreement. *See In re Smouha*, 136 B.R. 921, 928 (S.D.N.Y.), *appeal dismissed*, 979 F.2d 847 (2d Cir. 1992). Still other parties contested the agreement directly before the district court. These claims too were rejected, however, and the district court formally accepted the plea agreement in January, 1992.

Shortly thereafter, the district court issued the first of three orders forfeiting all identified BCCI property located within the United States. The two later orders were issued in response to the discovery of additional assets. The forfeited amount – in aggregate approximately $552 million – largely came from bank accounts maintained at various U.S. banks in the names of specific overseas branches of BCCI. Following the district court's issuance of the three orders, numerous third parties, appellants among them, filed petitions claiming legal interests in the BCCI assets forfeited to the government.

Under the RICO Act, third parties are given an opportunity to challenge a forfeiture order if they can assert that they have a "legal interest in property which has been ordered forfeited." 18 U.S.C. § 1963(*l*)(2). A party who files a petition alleging a "legal interest" that, if established, would compel amendment of the forfeiture is then entitled to a hearing. *Id.* Section 1963(*l*)(6) sets forth the grounds upon which the court may grant relief.

> If, after the hearing, the court determines that the petitioner has established by a preponderance of the evidence that –
>
> > (A) the petitioner has a legal right, title, or interest in the property, and such right, title, or interest was vested in the petitioner rather than the defendant or was superior to any right, title, or interest of the defendant at the time of the commission of the acts which gave rise to the forfeiture of the property under this section; or
> >
> > (B) the petitioner is a bona fide purchaser for value of the right, title, or interest in the property and was at the time of purchase reasonably without cause to believe that the property was subject to forfeiture under this section;
>
> the court shall amend the order of forfeiture in accordance with its determination.

18 U.S.C. § 1963(l)(6).

Two of the petitions at issue in this appeal were filed by persons claiming to represent a class of worldwide depositors in BCCI. These "class petitioners" had previously initiated a massive civil RICO action against the

founders, officers, and directors of BCCI as well as against numerous allegedly blameworthy "related" third parties. *See Hamid v. Price Waterhouse & Co.*, 15 RICO Law Rep. 1234, 1242-43, 1251 (C.D. Cal. 1992) (dismissing complaint on standing grounds). The class representatives' petitions merely asserted that the class members had an interest in the forfeited property. The nature and extent of that interest, they stated, could be found in an appended copy of the RICO complaint, 482 pages in length, filed in the *Hamid* case.

Raymond Davies, the other petitioner in this case, was appointed by a Sierra Leone court as conservator over BCCI's affairs in that country. As representative of the Sierra Leone branch depositors, Davies filed a petition challenging the forfeiture of $2 million held in the name of BCCI (Overseas) Sierra Leone at a New York bank. Davies alleged that the Sierra Leone deposits were entitled to a constructive trust over the funds because the alternative – pooling the Sierra Leone branch funds with those of the bank as a whole – would unjustly enrich BCCI; once recognized, such a trust would constitute a "superior" interest under § 1963(*l*)(6)(A). Alternatively, he argued that the depositors qualified as "bona fide purchasers" entitled to amendment of the order under § 1963(*l*)(6)(B).

The government moved to dismiss both parties' petitions on the ground that they had failed to state claims entitling them to relief under the statute. The class petitioners urged the district court to view their petitions as presenting the same legal theories Davies had advanced on behalf of the Sierra Leone depositors. The district

court somewhat skeptically granted this request and, further, assumed that a constructive trust could qualify as a "legal interest" under the RICO Act. *United States v. BCCI Holdings (Luxembourg), S.A.*, 833 F. Supp. 9, 13-14 (D.D.C. 1993). It nevertheless dismissed the class petitioners' claims. Their allegations, the court held, did not entitle them to the equitable remedy of a constructive trust; that relief would be fundamentally inequitable to the other depositors worldwide, who would not have the benefit of contributions from the forfeited assets to the global litigation fund. *Id.* The court also dismissed the class petitioners' alternative claim, based on their asserted status as general creditors, for failure to satisfy § 1963(*l*)(2)'s requirement that third parties claim an interest "in property" subject to forfeiture. *Id.* at 14-16. The Davies petition was dismissed on similar grounds in a separate ruling. *United States v. BCCI Holdings (Luxembourg), S.A.*, 833 F. Supp. 32, 39-40 (D.D.C. 1993). The appeals were consolidated.

II.

Appellants argue that the district court improperly ruled on the merits of their constructive trust allegations under § 1963(*l*)(6)(A) without granting them the benefit of an evidentiary hearing. They also assert that the district court incorrectly held that their alternative claims as general creditors could not satisfy the "bona fide purchaser" requirement of § 1963(*l*)(6)(B). The case turns, then, on whether the district court was correct in rejecting the petitions as a matter of law.

The government claims that the class petitioners are not even entitled to rely on the constructive trust theory on appeal because they did not properly raise it in their petitions below. The class petitioners made the constructive trust claim to the district court only at oral argument on the motions. For this reason, the district judge surely could have refused to permit the class petitioners – whose petitions were so sketchy and who did not even assert the constructive trust theory in their memorandum of law – to argue the issue at all. But she decided to "provide the claimants a generous benefit of the doubt and treat their petitions as if they alleged interests arising both from constructive trusts and from general debtor/creditor relationships." 833 F. Supp. at 13-14. Since Davies had properly presented the issue in his petition, it is not surprising that the district judge permitted the class petitioners, albeit grudgingly, to piggy-back on his theory, especially as the court ultimately rejected the claim. In any event, the government only asserts that the class petitions cannot support a constructive trust claim, not that the district court was in error in giving the class petitioners such wide latitude; since the government does not actually challenge the district judge's ruling, we do not understand why the government even raises the matter before us.

As to the district court's disposition of the constructive trust claim, the government asks that we affirm – but on different grounds. It argues that since a constructive trust is a creation of equity courts, *see, e.g., Healy v. Commissioner*, 345 U.S. 278, 282 (1953) ("A constructive

trust is a fiction imposed as an *equitable* device for achieving justice." (emphasis added) (citation omitted)), it cannot be recognized under § 1963(*l*)(6)(A) as a "*legal* right, title, or interest" (emphasis added). A party with any sort of equitable, as opposed to legal, claim – using the classic common law distinction – may only seek relief by appealing to the Attorney General, who may

> grant petitions for mitigation or remission of forfeiture, restore forfeited property to victims of a violation of this chapter, or take any other action to protect the rights of innocent persons which is in the interest of justice and which is not inconsistent with the provisions of this chapter. . . .

18 U.S.C. § 1963(g)(1). As recognized by the Second Circuit in *United States v. Schwimmer*, 968 F.2d 1570 (2d Cir. 1992), whether the statute recognizes equitable interests or only strictly "legal" ones is a close question. *See id.* at 1582 (a "legal interest" is an interest "in property or in claim cognizable at law in contrast to equitable interest" (quoting Black's Law Dictionary, 894 (6th ed. 1990)). The legislative history of the 1984 amendments that created the § 1963(*l*) proceedings suggests that Congress contemplated a distinction between traditionally "legal" and traditionally "equitable" interests. The Senate report indicated that § 1963(*l*) hearings were for parties claiming "a legal basis for relief" whereas the Attorney General's authority to grant relief under § 1963(g)(1) was the "appropriate ex[cl]usive remedy" for those asserting "merely equitable grounds." S. Rep. No. 225, 98th Cong., 2d Sess. 208, *reprinted in* 1984 U.S. Cong. Code & Admin.

News 3182, 3391. The government, then, has some support in urging us to limit the scope of "interest" under § 1963(*l*)(6)(A) to exclude equitable claims. But the congressional history is not dispositive. It is unclear whether the drafters intended to use to words "legal" and "equitable" in their technical senses or whether they were using the terms more as laymen do (and sometimes lawyers as well) with "legal" meaning "legally enforceable" or "recognized under law" and "equitable" implying "fair and just." *Compare* Black's Law Dictionary, 892 ("legal" defined as "according to law" or "proper or sufficient to be recognized by the law"); *id.* at 537 ("equitable" defined as "conformable to the principles of justice and right"). The Senate report apparently used the term "equitable" in its more expansive sense when referring to the Attorney General's authority to refashion forfeitures to protect innocent third parties, for § 1963(g)(1) allows the Attorney General to take any action "in the interest of justice." It would follow that the word "legal" was used in the legislative history – and, presumably, the statute – in its broader sense as well.

At the end of the day, we agree with our sister circuits that have rejected the notion that Congress intended to draw the ancient, but largely ignored, distinction between technically legal and technically equitable claims in forfeiture challenges. *See Schwimmer*, 968 F.2d at 1582; *United States v. Lavin*, 942 F.2d 177, 185 n.10 (3d Cir. 1991); *United States v. Campos*, 859 F.2d 1233, 1238-39 (6th Cir. 1988) (dicta). Prior to 1984, third parties claiming an interest in forfeited property could only petition the Attorney General for relief. Section 1963(*l*) was added to

alleviate due process concerns; obviously, only the property of the defendant (including property held by a third party pursuant to a voidable transaction) can be confiscated in a RICO proceeding. *See* S. Rep. No. 225, 98th Cong., 2d Sess. 208, *reprinted in* 1984 U.S. Cong. Code & Admin. News 3182, 3391. It seems to us that it would just as much offend notions of due process for the government to scoop up property in which a third party has certain kinds of equitable interests as it would for the government to take property in which a third party as a "legal" interest. Suppose, for instance, that a lawyer was a trustee who held assets in trust for the benefit of others, and that the lawyer, who was also part of a racketeering ring, used those assets in furtherance of criminal ends. We simply cannot imagine that Congress would have intended that the trust corpus by forfeited to the government without opportunity for challenge by the beneficiaries any more than it would property that the lawyer held as a bailee. Indeed, it seems to us that focusing on the distinction between equitable and legal interests obscures Congress' real intent. The key words in section 1963(*l*)(6)(A) to identify statutorily cognizable third party interests are "vested," "superior," and "at the time." To prevail under that provision, a third party must establish that his interest had vested or was superior to the defendant's interest *"at the time of the commission of the acts which gave rise to the forfeiture."*

It is because of that language in the section that we agree with the government that a constructive trust may not be used to defeat the government's forfeiture claim. Congress intended that as far as § 1963(*l*)(6)(A) is concerned, a third party's claim is to be measured not as it

might appear at the time of litigation, but rather as it existed at the time the illegal acts were committed. A constructive trust is a *remedy* that a court devises after litigation. It is, as we have noted, a fictional trust – not a real one. It could not have been shown to exist at the time the acts were committed. Moreover, Congress provided under § 1963(c) of the RICO forfeiture Act that title in all criminally acquired property of the defendant is deemed to "vest[] in the United States upon the commission of the act giving rise to forfeiture." Congress, in other words, devised a statutory remedial scheme that reaches *back to the time of the criminal acts* to forfeit the property to the United States. The statute thus creates a retroactive legal fiction similar to a constructive trust for the benefit of the United States. It is not open to a court to fashion another remedy (a competing fiction) that also reaches back to snatch the property away from the United States – which is exactly what a constructive trust would do.

We therefore disagree with those courts that have determined that a constructive trust can be interposed as superior to the government's forfeiture claim. *See Schwimmer*, 968 F.2d at 1582; *Lavin*, 942 F.2d at 187; *Campos*, 859 F.2d at 1238-39 (dicta); *United States v. Marx*, 844 F.2d 1303, 1307-08 (7th Cir. 1988). While those courts, in our view, properly rejected the government's legal/equitable distinction, they did not consider whether a judicially imposed constructive trust would be inconsistent with the statutory remedial scheme.

III.

Alternatively, appellants argue – in anther effort to gain a direct claim against the forfeited property – that even if, as mere depositors, they are only general creditors, they should be thought of as "bona fide purchasers" entitled to recover under § 1963(*l*)(6)(B). That section, it will be recalled, provides that a petitioner can establish a statutory "interest" by demonstrating that he

> is a bona fide purchaser for value of the right, title, or interest in the property and was at the time of purchase reasonably without cause to believe that the property was subject to forfeiture under this section;

18 U.S.C. § 1963(*l*)(6)(B). Appellants' claim appears rather anomalous on its face, since bank depositors, as general creditors, have no interest in the specific accounts to which their deposits might be traced, only in the defendant's estate as a whole – and therefore can have no interest in particular assets forfeited, as required under both prongs of § 1963(*l*)(6), unless they have already secured a judgment against the debtor and perfected a lien against a particular item. *See Schwimmer*, 968 F.2d at 1581; *Campos*, 859 F.2d at 1240. Nevertheless, petitioners argue that since the amount of their claims (in the billions of dollars, we are told) exceeds BCCI's entire estate, their interest *necessarily* extends to any portion of the estate that has been forfeited to the government. They rely primarily on a Fourth Circuit opinion, *United States v. Reckmeyer*, 836 F.2d 200 (4th Cir. 1987), applying an identical statutory section that applies to drug trafficking crimes, 18 U.S.C. § 853(n) (1988). *Reckmeyer* accepted the theory that general creditors have an interest in forfeited

property if that property represents their only means of recovery and, further, that under such circumstances they should be regarded as "bona fide purchasers." *Reckmeyer*, 836 F.2d at 205, 207-08.

The government argues that both parts of *Reckmeyer*'s holding are incorrect and should not be followed. The Second Circuit, in *Schwimmer*, distinguished *Reckmeyer* on grounds that whereas the petitioners before it had asserted only an interest arising under 1963(*l*)(6)(A), which requires that a claimant have a "vested" interest in forfeited property or one "superior" to the defendant-debtor, *Reckmeyer* dealt with a "bona fide purchaser" claim under the provision of the drug crime for forfeiture statute parallel to § 1963(*l*)(6)(B) of the RICO Act. *See* 968 F.2d at 1481 & n.8. It is this latter provision upon which petitioners now rely.

We respectfully disagree with *Reckmeyer*. We think the government is correct that a general creditor can never have an interest in specific forfeited property, no matter what the relative size of his claim vis-a-vis the value of the defendant's post-forfeiture estate. Were it otherwise, the court litigating the forfeiture issue would be converted into a bankruptcy court and would not be able to grant forfeiture to the government until it determined that no general creditor would be unable to satisfy its claim against the defendant. That result appears patently at odds with the statutory scheme, which directs parties without an interest in specific property to seek relief from the Attorney General, not the court adjudging the forfeiture. The Attorney General has authority to

dispense confiscated funds "to protect the rights of innocent persons," 18 U.S.C. § 1963(g)(1), and general creditors seem precisely the type of innocent persons Congress had in mind.

Although a general creditor whose claim exceeds the value of the debtor's estate may in some sense have a legal interest against the entire estate, that is simply not the same as an interest in specific forfeited property – and contrary to *Reckmeyer*, under either prong of § 1963(*l*)(6), only the latter can defeat the government's claim. In addition to disregarding the statute's "in the property" requirement, *Reckmeyer* also relied upon an even more troublesome interpretation of the statute at the second stage of its analysis. The Fourth Circuit construed the term "bona fide purchasers for value" "liberally," as it put it, to include a general creditor. It reached this conclusion by reasoning that Congress could not have intended that "a car dealer who sold a car to a later convicted defendant without knowledge of the potential forfeitability of the defendant's assets could have the payment he received for the car forfeited while a person who purchased otherwise forfeitable stock from the defendant would be protected." *Reckmeyer*, 836 F.2d at 208. But we do not understand why the dealer's situation would be analogous to a general creditor's since, by hypothesis, he had already been paid. Nor do we see how, in the first case, the cash received by the dealer would be forfeited as the defendant's property (unless, perhaps, it had not been acquired in an arms-length transaction). Finally, the conclusion which the Fourth Circuit reached by its reasoning – that Congress wished to protect all those who engage in arms-length transaction

with the defendant – would mean that *all* innocent creditors would fall into the bona fide purchaser category. The difficulty with this position is that it is contrary to the natural meaning of what Congress said. Bona fide purchasers are not the same thing as general creditors.

* * *

In sum, we affirm the district court's dismissals of appellants' petitions on the grounds that they failed to state claims under the statute.

So Ordered.

UNITED STATES of America

v.

BCCI HOLDINGS (LUXEMBOURG), S.A., Bank of Credit and Commerce International, S.A., Bank of Credit and Commerce International (Overseas) Limited, and International Credit and Investment Company (Overseas) Limited, Defendants.

Cr. No. 91-0655 (JHG)

United States District Court,
District of Columbia.

Aug. 19, 1993.

ORDER DISMISSING THE MARCH 11, 1992 AND SEPTEMBER 11, 1992 PETITIONS OF SHRICHAND CHAWLA, LEO D. CURRAN, WILLY HERMANS AND RED CIRCLE INVESTMENT, LTD., JALEH KHORASSANCHY, AMIT PANDYA, SOHA, INC., IDRISS DEVCO, INC., AND S & L GENTRADE, INC.

JOYCE HENS GREEN, District Judge.

Presently pending are the United States' motions to dismiss the petitions for hearings to adjudicate interests in forfeited property filed by **Shrichand Chawla, Leo D. Curran, Willy Hermans and Red Circle Investment, Ltd., Jaleh Khorassanchy, Amit Pandya, Soha, Inc., Idriss Devco, Inc., and S & L Gentrade, Inc.** (the "petitioners" or "claimants"). Upon consideration of the motions to dismiss, all filings relating thereto, and oral argument presented at the May 14, 1993 hearing, the motions are granted and the petitions are dismissed.

BACKGROUND

On January 24, 1992, this Court, following findings of fact and conclusions of law with supporting reasons made in open court, accepted the pleas of guilty of the four corporate defendants (collectively "BCCI") and the plea agreement between them and the United States of America. Thereupon, and in accordance with 18 U.S.C. § 1963, an Order of Forfeiture was entered. Paragraph 1(e) of the Order provides that the corporate defendants named in this action shall forfeit to the United States ownership interests in all property located in the United States, including, without limitation, real property and all tangible and intangible personal property, however held, whether subsequently identified, determined or discovered in the course of the ongoing liquidation proceedings described therein or otherwise identified, determined, or discovered in any manner at any time, but not property that may be brought into the United States by or on behalf of court-appointed fiduciaries of BCCI in the course of the management or disbursement of the liquidation estates as described in the plea agreement. Attached to the January 24, 1992 Order as Exhibit A was a list of specific BCCI accounts, with corresponding numbers, names, and approximately balances, which the United States Marshals Service was directed to seize forthwith. Because the government was unable to verify certain information concerning additional forfeitable accounts at the time the Order of Forfeiture was entered, the Court issued a supplemental Order on January 31, 1992 which directed immediate seizure of the specific assets listed therein.

In satisfaction of 18 U.S.C. § 1963(*l*)(1), and to inform third parties of potential rights to seek recovery of assets declared forfeited, the United States published notice of Order of Forfeiture, as amended, during the period between February 13, 1992 and March 27, 1992 in eleven major United States newspapers including the *Wall Street Journal*, the *New York Times*, the *Chicago Tribune*, and the *Los Angeles Daily Journal See* Government's Compliance with Order of May 8, 1992, filed May 12, 1992. In addition, personal notice was sent to over 340 persons and entities as late as April 3, 1992. *Id.*

The claimants filed their first petition to amend the Order of Forfeiture on March 11, 1992. In that three page submission, they claimed to represent a class of over one million BCCI depositors in an action styled *Hamid v. Price Waterhouse & Co.*, Case No. CV-89-6538, which was then pending in the United States District Court for the Central District of California. Third Party Petition for Hearing to Adjudicate Property Interest (18 U.S.C. § 1963) ("Petition") at 1. The third amended complaint filed in the California case alleged that the plaintiffs lost billions of dollars due to racketeering and fraud committed by the 76 named defendants, including Price Waterhouse, Ernst & Young, Abu Dhabi, Clark Clifford, Robert Altman, and Manuel Noriega. To describe the interests which the claimants seek to recover in this case, the petition incorporated by reference the *Hamid* complaint and merely stated:

> The nature and extent of Petitioner's right, title, or interest in the subject property, which are superior to BCCI's claims at the time of the commission of the acts which gave rise to the

> guilty plea and forfeiture under 18 U.S.C. § 1963(1), the time and circumstances of Petitioner's acquisition of the right, title, or interest in the property, additional facts supporting the claims and the relief sought are alleged in detail in the attached Third Amended Complaint.

Petition at 2. Unfortunately, the third amended complaint, which exceeds 475 pages[1], sheds little light on the nature and extent of the legal interest asserted, especially since the defendants in this case were not parties to the *Hamid* litigation.

Because the California complaint was based on charges of racketeering and fraud, the government characterized the petitioners as tort claimants and addressed their claim in its Motion to Dismiss Petitions of BCCI Tort Petitioners, which also addressed claims filed by Banco Central de Reserva del Peru ("Peru"),[2] the Republic of Panama, and Lee Scarfone, Patricia Scarfone, ALSA International, Inc., and Banditball, Inc. ("the Scarfones").[3] The

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[1] The petitioners represented that exhibits exceeding 2000 pages were attached to the complaint filed in the California action, Petition at 2-3, but those exhibits were not submitted to this Court.

[2] The Court dismissed Peru's petitions on February 22, 1993, holding that tort claimants could not be considered "bona fide purchasers for value" under 18 U.S.C. § 1963(*l*)(6)(B). *United States v. BCCI Holdings (Luxembourg), S.A.*, 814 F.Supp. 111 (D.D.C. 1993).

[3] The Court dismissed the Scarfones' petition on February 23, 1993, holding that as unsecured creditors, they could not assert the requisite interest in forfeited property. *United States v. BCCI Holdings (Luxembourg), S.A.*, 1993 WL 170640 (D.D.C.1993).

court-appointed fiduciaries for the four corporate defendants subsequently filed a memorandum of law addressing the same claims. The petitioners filed an opposition to the government's motion in which they argued that they should be considered depositors, rather than tort claimants, who were fraudulently induced to place money with BCCI. More specifically, the petitioners contended that because BCCI solicited deposits to be used for undisclosed legal purposes, the debtor/creditor contracts they entered were illegal and *void ab initio.* The depositors claimed that since they never passed title to their deposited funds to BCCI, those funds could not lawfully be forfeited to the United States. Memorandum on Behalf of Class Depositor/Petitioners' in Opposition to the Government's Motion to Dismiss Third Party Petitions for Hearing to Adjudicate Property Interest, filed June 22, 1992, at 12. The government filed a reply to the opposition, noting that the opposition constituted a "last minute attempt to rewrite their L-claims," Government's Reply to Oppositions to Motion to Dismiss Petitions of BCCI Tort Petitioners at 24, and citing reasons why the petitioners' new theory should be rejected.

On June 24, 1992, the government filed a Motion to Amend Order of Forfeiture to Include Additional Property, seeking forfeiture and seizure of assets in newly discovered bank accounts held in the names of the corporate defendants, proceeds from the sale of a condominium purchased with resources provided by a corporate defendant, money remaining in a "BCCI Legal Fund" established by one of the corporate defendants for the defense of its employees' legal interests, a bankruptcy distribution to one of the corporate defendants, and

assets held at various New York financial institutions in the name of ICIC Investments Ltd., a sibling corporation of defendant ICIC (Overseas) Ltd. The Court granted the government's motion and issued an Order of Forfeiture on July 29, 1992. The United States subsequently provided notice of the Order to potential claimants.[4]

The claimants filed their second petition on September 11, 1992, which was identical to the first except that it sought to recover funds forfeited in July 1992. The government filed a motion to dismiss the petitioners' "Round Two" claim, which also addressed second petitions filed by Peru and the Scarfones. The petitioners filed an opposition and the government submitted a reply. Oral argument on both motions was heard on May 14, 1993.

DISCUSSION

As an initial matter, the Court has serious doubts about the claimants' standing to file a petition on behalf of the more than one million BCCI depositors worldwide. Although the *Hamid* case was filed as a class action, no class was ever certified and the case has been dismissed by the District Court. In addition, no motion for class certification has been filed with this Court. Nonetheless, in light of the legal conclusions made below relating to the merits of the claims and because the time which putative class members could file individual petitions to amend the January 24, 1992 and July 29, 1992 Orders of Forfeiture has expired, the petitions will be treated, for

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[4] Over 100 petitions to amend the two Orders of Forfeiture have been filed as of this date.

purposes of resolving the government's motions to dismiss, as having been filed by a class of worldwide depositors. In addition, no motion for class certification has been filed with this Court.

Title 18, United States Code, § 1963 sets forth an orderly procedure by which third parties seeking to recover interests in forfeited property may obtain judicial resolution of their claims. The provision granting standing to parties seeking to amend an order of forfeiture to exclude certain property states:

> Any person, other than the defendant, asserting a legal interest in property which has been ordered forfeited to the United States pursuant to this section may, within thirty days of the final publication of notice or his receipt of notice . . . , whichever is earlier, petition the court for a hearing to adjudicate the validity of his alleged interest in the property.

18 U.S.C. § 1963(*l*)(2). Section 1963(*l*)(6) sets forth the substantive elements which a third party must establish to successfully obtain amendment of an order of forfeiture and provides in full:

> If, after the hearing, the court determines that the petitioner has established by a preponderance of the evidence that –
>
> (A) the petitioner has a legal right, title, or interest in the property, and such right, title, or interest renders the order of forfeiture invalid in whole or in part because the right, title, or interest was vested in the petitioner rather than the defendant or was superior to any right, title, or

> interest of the defendant at the time of the commission of the acts which gave rise to the forfeiture of the property under this section; or
>
> (B) the petitioner is a bona fide purchaser for value of the right, title, or interest in the property and was at the time of purchase reasonably without cause to believe that the property was subject to forfeiture under this section; the court shall amend the order of forfeiture in accordance with its determination.[5]

Only by establishing standing and satisfaction of all exquisite elements of either § 1963(*l*)(6)(A) or (B) may a party obtain judicial relief from an order of forfeiture. *See United States v. Schwimmer*, 968 F.2D 1570, 1584 (2d Cir.1992) ("The *only* role of the District Court is to amend the order of forfeiture where a genuine property interest of the sort specified in § 1963(*l*)(6) is demonstrated.") (emphasis in the original); *United States v. Lavin*, 942 F.2d 177, 198 (3d Cir.1991) ("Those third parties who fall outside of the [limited avenues of relief], regardless of how sympathetic they are, must petition the Attorney General for relief.") If a third party fails to allege in its petition all elements necessary for recovery, including those relating to standing, the court may dismiss the petition without providing a hearing. *See United States v. Campos*, 859 F.2d

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[5] Title 18 U.S.C. § 1963 (*l*)(6) contains exactly the same language as 21 U.S.C. § 853(n)(6), the statute providing for forfeiture in criminal narcotics cases, and it appears that no court has interpreted these two provisions differently. Because the two subsections are identical and because of the relative dearth of caselaw interpreting and applying § 1963 (*l*), the Court's opinion relies on reasoning contained in § 853(n) cases as well as in § 1963(*l*) cases.

1233, 1240 (6th Cir.1988); *United States v. Mageean*, 649 F.Supp. 820, 825 (D.Nev.1986), *aff'd without opinion*, 822 F.2d 62 (9th Cir.1987); S.Rep. No. 225, 98th Cong., 2d Sess., *reprinted in* 1984 U.S.Code Cong. & Admin.News 3182, 3374, 3391.

The litigation tactics of the petitioners and their chameleon-like characterizations of their claims have greatly frustrated the Court's attempts to understand the nature of the legal right, title, or interest in property which they seek to recover. The petitions' incorporation by reference of the third amended complaint in the *Hamid* case led the government, the court-appointed fiduciaries, and the Court to believe that the interests asserted arose out of alleged torts committed by BCCI or its agents. The petitioners' opposition to the government's motion to dismiss the first petition, however, indicates that the asserted interest is based on a theory that the petitioners were special depositors who never transferred title to their deposits to BCCI. Under that theory, it appeared that the petitioners claimed to be secured creditors of BCCI with ownership interests in traceable assets. When asked at the hearing, "What's the exact nature of the interest you are seeking in this case, the one before this Court? . . . [A]re you claiming the interest arising as depositors, as tort interests, contractual? What?," Transcript of May 14, 1993 Motion Hearing ("Tr.") at 16, counsel for the petitioners provided yet another characterization by responding, "We are general creditors. We acknowledge that. We do not call ourselves tort claimants. We are like the way the Court characterized the Scarfones' claims." Tr. at 17-18. Notwithstanding that clear representation, counsel asserted only minutes later that the petitioners' interest

arose from a constructive trust similar to the one imposed in *United States v. Schwimmer*, Tr. at 19. This theory was never raised by the Scarfones. When asked whether the claimants asserted interests arising out of a constructive trust in their petitions or in any other filings, counsel conceded, "No, because Your Honor, I was not aware of the point. I learned of it from reading the Bank of Japan's brief. I will say that in all candor." Tr. at 27. Though the Court has considered treating the terse petitions as if they asserted interests arising from tortious conduct and dismissing them summarily for the reasons supporting the dismissal of the petitions filed by Peru, *United States v. BCCI Holdings (Luxembourg), S.A.*, 814 F.Supp. 111 (D.D.C. 1993), it will provide the claimants a generous benefit of the doubt and treat their petitions as if they alleged interests arising both from constructive trusts and from general debtor/creditor relationships.

A. STANDING ISSUES ARISING UNDER 18 U.S.C. § 1963(*l*)(2)

Because 18 U.S.C. § 1963(*l*)(2) provides standing only to third parties asserting "*legal* interest[s] in property which has been ordered forfeited to the United States" (emphasis added), and because 18 U.S.C. § 1963(g) allows the Attorney General to restore forfeited property to victims when "in the interest of justice" and "non inconsistent" with other provisions of RICO, it might appear to some that constructive trusts, which are equitable remedies, cannot afford standing to third parties seeking to recover forfeited assets pursuant to § 1963(*l*). As the Second Circuit has recognized, however, the term "legal"

is ambiguous and "may be interpreted to mean, 'traditionally enforceable at law,' as opposed to 'traditionally enforceable at equity,' or it may mean, 'according to the law' as opposed to 'according to what is considered just and equitable.' " *Schwimmer*, 968 F.2d at 1582. While the Court concedes that the latter interpretation may not be as "obviously" correct as the Third Circuit found it to be, *Lavin*, 942 F.2 at 185 n. 10, it is nonetheless is persuaded by *Schwimmer* and the cases cited therein that "the term 'legal' in § 1963(*l*) should be interpreted to mean 'under the law,' " and that beneficiaries of constructive trusts can therefore have standing to seek judicial relief from an order of forfeiture. *Schwimmer*, 968 F.2d at 1582.

Notwithstanding the above conclusion relating to general notices of standing, it is inappropriate to impose a constructive trust in favor of the specific petitioners presently before the Court. As the record of this case clearly shows, one of the most significant motivating factors behind the Court's approval of the plea agreement between the United States and BCCI was the fact that the agreement provided for the creation of a worldwide victims fund so that "innocent victims of BCCI's wrongdoing can recover at least a portion of lost assets in as fair a manner as possible – equitable, orderly, and expeditious." Transcript of Plea Acceptance and Sentence, January 24, 1992, at 6. The Court expressly recognized, "Because the fund will be administered on a global scale through unified proceedings, piecemeal and unfair distribution can be avoided." *Id.* Assuming as true the petitioners' allegation that all deposits made by the purported class of claimants were fraudulently induced, there can be no doubt that imposition by this Court of a constructive trust

on those deposits would cause gargantuan disruption of the global liquidation proceedings currently underway. Besides the practical consideration of this Court's inability to adjudicate whether each of the approximately one million depositors can establish that they made deposits and that such deposits were forfeited by this Court, imposing a trust would significantly harm the abilities of other BCCI creditors to recover fair portions of lost funds. Therefore, in accordance with the rationales of *Sisters of the Presentation of the Blessed Virgin Mary of Aberdeen, South Dakota v. Nat'l Credit Union*, 961 F.2d 733 (8th Cir.1992); *Downriver Community Fed. Credit Union v. Penn Square Bank*, 879 F.2d 754 (10th Cir.1989), *cert. denied*, 493 U.S. 1070, 110 S.Ct. 1112, 107 L.Ed.2d 1019 (1990), and *Bruneau v Fed. Deposit Ins. Corp.*, 785 F.Supp. 585 (E.D.La.), *aff'd*, 981 F.2d 175 (5th Cir.1992), a constructive trust in favor of the petitioners will not be imposed.

Given that no constructive trust is recognized, petitions are considered, in accordance with their own prior description, to be "like the way the Court characterized the Scarfones' claims," Tr. at 18 – this is, simply as general creditors of BCCI. Unlike the beneficiary of a constructive trust, an unsecured or general creditor does not possess an interest in any specific asset of a debtor and merely has a general interest in the debtor's entire estate. *See* February 23, 1993 Order Dismissing the March 18, 1992 and September 4, 1992 Petitions of Lee Scarfone, Patricia Scarfone, ALSA International, Inc. and Banditball, Inc., *United States v. BCCI Holdings (Luxembourg), S.A.*, ___ F.Supp. ___ (D.D.C.1993); *Schwimmer*, 968 F.2d at 1581 ("A general creditor has no interest in a particular asset or particular funds that is either vested or superior to a

defendant's. He may have a right to receive payment, but he does not have a property interest superior to defendant's in any particular asset or funds. . . . "); *Campos*, 859 F.2d at 1240 (unsecured creditors who filed third-party claims "failed to allege or make a prima facie showing of any legal right, title, or interest in the *forfeited property*") (emphasis added); *United States v. Reckmeyer*, 836 F.2d 200, 206 & n. 3 (4th Cir.1987) ("Unlike secured creditors, general creditors cannot point to any one specific asset and claim that they are entitled to payment of the value of that specific asset. General creditors instead enjoy a legal interest in the entire estate of the debtor."); *Mageean*, 649 F.Supp. at 828 ("The Court . . . concedes the [unsecured] creditors do not, in a technical sense, have legal interests in the forfeited property."). Because general creditors are unable to assert interests in specific assets, they cannot assert legal rights, titles, or interests "in property which has been ordered forfeited" as required by § 1963(*l*)(2), at least in situations where a defendant's entire estate is not subject to forfeiture. *See Reckmeyer* at 206 n. 3 ("It is the dilemma of linking their interest to a specific asset rather than the problem of asserting a legal interest in the debtor's estate that frustrates general creditors who attempt to contest civil forfeitures."). Accordingly, given that the Court's Orders of Forfeiture reach only property located in the United States and not the entire estates of the four corporate defendants, the claimants do not have standing to seek amendment of the Court's Orders of Forfeiture and their petitions must be dismissed.

B. ISSUES RELATING TO THE SUBSTANTIVE REQUIREMENTS OF 18 U.S.C. § 1963(*l*)(6)(A) AND (B)

Even were the claimants found to have standing under § 1963(*l*)(2), they could not, as general unsecured creditors, be considered to have the "vested" or "superior" rights, titles, or interests in forfeited property which are required by § 1963(*l*)(6)(A). As recognized by the Second Circuit, "the categories of *vested* and *superior* are intended to cover those cases where the Court lacks jurisdiction over the property because it is not really 'property of the defendant.' " *Schwimmer*, 968 F.2d at 1581 (emphasis in the original). Because unsecured creditors lack property interests superior to a defendant's in particular assets or funds that warrants an amendment of an order of forfeiture under § 1963(*l*)(6)(A)." *Id.*[6]

In addition to failing to meet all requirements of § 1963(*l*)(6)(A), the claimants are unable to satisfy all prerequisites of the only other basis for court-ordered relief, § 1963(*l*)(6)(B). When defining the third parties who could recover under subsection (B), Congress used the phrase "bona fide purchaser for value," a legal term of art referring to certain buyers of tangible property. *See Lavin*, 942 F.2d at 185; *Campos*, 859 F.2d at 1238; *Mageean*, 649 F.Supp. at 829. Though some courts applying § 1963(*l*)(6)(B) or its equivalent in the Comprehensive Drug Abuse Prevention and Control Act, 21 U.S.C.

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[6] Had a constructive trust been imposed in favor of the petitioners, it appears that they might be able to recover under § 1963(*l*)(6)(A), but only if they could trace their interests to specific funds before the Court. *See Schwimmer*, 968 F.2d at 1583.

§ 853(n)(6)(B), have interpreted the phrase to include any person engaging in an arms' length business transaction, *see, e.g., Reckmeyer*, 836 F.2d at 208; *Mageean*, 649 F.Supp. at 829, such a broad interpretation of the phrase is inappropriate. As Justice O'Connor has noted, "a judge must presume that Congress chose its words with as much care as the judge [herself] brings to bear on the task of statutory interpretation," *FBI v. Abramson*, 456 U.S. 615, 635, 102 S.Ct. 2054, 2066, 72 L.Ed.2d 376 (1982) (dissenting opinion), and the literal language of a statute should be conclusive in the absence of a clearly expressed legislative intent to the contrary. *See Russello v. United States*, 464 U.S. 16, 20, 104 S.Ct. 296, 299, 78 L.Ed.2d 17 (1983). *See also Evans v. United States*, ___ U.S. ___, ___, 112 S.Ct. 1882, 1885, 119 L.Ed.2d 57 (1992) ("It is a familiar 'maxim that a statutory term is generally presumed to have its common-law meaning.' ") (quoting *Taylor v. United States*, 495 U.S. 575, 592, 110 S.Ct. 2143, 2155, 109 L.Ed.2d 607 (1990)). Congress could easily have adopted language in § 1963(*l*)(6)(B) expressly providing protection to all parties engaged in arms' length transactions with defendants, and its failure to do so is strong evidence of a desire not to provide such a wide avenue of relief. The Senate Judiciary Committee's report on the statute does not provide persuasive evidence of a clear intent to the contrary. It is true that the report recognized that the purpose of the relation back doctrine codified at § 1963(c) was to "close a potential loophole in current law whereby the criminal forfeiture sanction could be avoided by transfers that were not *'arms' length.'* " S.Rep. No. 225, 98th Cong., 2d Sess. 200-01, *reprinted in* 1984 U.S.Code Cong. & Admin.News 3383-3384 ("S. Rep.") (emphasis

added). However, when the report addressed the nature of relief available to third parties under § 1963(*l*)(6), the provision at issue here, it used narrower language and spoke only of vested or superior interest holders and "bona fide *purchasers* for value." S.Rep. at 209, 1984 U.S.Code Cong. & Admin.News at 3392 (emphasis added). Accordingly, in light of the clear statutory language and the absence of an unambiguously expressed contrary intent of Congress, the phrase "bona fide purchaser for value" is interpreted to refer only to a certain class of buyers of tangible property. Because the claimants did not obtain their alleged interests through the purchase of tangible property, they would not be entitled to relief under § 1963(*l*)(6)(B) even were they found to have standing under § 1963(*l*)(2).[7]

C. THE PETITIONERS' REQUEST FOR A STAY

At the close of the hearing on the government's motions to dismiss, the petitioners asked for a stay prohibiting the disbursement of forfeited funds in the event the motions are granted. In a written filing submitted after the hearing and in accordance with a briefing schedule set by the Court, the government opposed the request, primarily on the grounds that a stay is premature

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[7] This Court's Order Dismissing the April 24, 1992 and September 2, 1992 Petitions of Banco Central de Reserva del Peru, 814 F.Supp. 111 (D.D.C. 1993), does not conflict with the above analysis. Because Banco Central de Reserva del Peru, as a tort claimant, could not be considered to have obtained its asserted interest even through an arms' length transaction, it was unnecessary to further define the scope of "bona fide purchase for value" in that opinion.

and unnecessary since no forfeited assets may be disbursed until the Court approves a formal motion for disbursement and until claims to forfeited assets have been "resolved." *See* Paragraph 7 of January 24, 1993 Order of Forfeiture.[8] The court-appointed fiduciaries for the corporate defendants agree that the denial of a stay would not result in any immediate disbursement of funds. In light of the procedures set forth in Paragraph 7 and the government's concession that third-party petitions may submit oppositions to disbursement motions based, *inter alia*, on the pendency of an appeal, *see* Government's Brief Relating to Stay Pending Appeal of order Dismissing L-Claim, filed June 2, 1993, at 3-5, the claimants' request for a stay is denied without prejudice. The petitioners' request for a stay may be renewed in the form of an opposition to a motion for disbursement.

CONCLUSION

For the reasons stated above, it is hereby

ORDERED that the March 11, 1992 and September 11, 1992 petitions filed by **Shrichand Chawla, Leo D. Curran, Willy Hermans and Red Circle Investment, Ltd., Jaleh**

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[8] Paragraph 7 provides in full:

> Pursuant to the ancillary hearing procedures set forth in Title 18, United States Code, Section 1963(*l*), no disbursements shall be made from the Account without further Order of this Court. Should it appear that no claim has been made with respect to particular assets transferred to the Account pursuant to Section 1963(*l*), or at such time as such claims to such assets have been resolved, the Court will entertain motions from the government for the disbursement of funds.

Khorassanchy, Amit Pandya, Soha, Inc., Idriss Devco, Inc., and S & L Gentrade, Inc. are dismissed. It is

FURTHER ORDERED that the petitioners' request for a stay pending appeal is denied without prejudice to renew in the form of an opposition to a motion for disbursement filed by the government. The government shall serve a copy of its motion for disbursement on counsel for the petitioners when such a motion is filed.

UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

In re BANK OF CREDIT AND COMMERCE INTERNATIONAL DEPOSITORS LITIGATION	No. MDL-908 No. CV 91-4483 CBM (Ex)
AKHTAR HAMID, et al., Plaintiffs, v. PRICE WATERHOUSE & CO., et al., Defendants.	ORDER VACATING MEMORANDUM OPINION; AMENDED MEMORANDUM OPINION

Upon review of the Court's Memorandum Opinion, the Court has discovered the following clerical errors:

1. On page 4, line 17 "million" should read "billion."

2. On page 19, line 4 "million" should read "billion."

In order to correct these clerical errors, the Court hereby vacates its Memorandum Opinion pursuant to Federal Rule of Civil Procedure 60(a) and issues the following Amended Memorandum Opinion.

AMENDED MEMORANDUM OPINION

These matters came on regularly for hearing on March 20, 1992 before the Court, the Honorable Consuelo B. Marshall, District Judge presiding, on plaintiffs'

motion to add additional parties, brought pursuant to Rules 15 and 21 of the Federal Rules of Civil Procedure, and defendants' motions to dismiss plaintiffs' third amended complaint (the "Complaint"), brought pursuant to Rules 9(b), 12(b)(1), and 12(b)(6) of the Federal Rules of Civil Procedure.[1] Also pending resolution are issues raised in defendant PW/UK's motion which the Court took under submission on January 15, 1992 (*i.e.*, whether

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[1] These include: (a) the motion of defendants Bank of America NT&SA and BankAmerica Corporation (collectively "BofA") to dismiss; (b) the motion of defendant Price Waterhouse U.K. ("PW/UK") to dismiss; (c) the motion of defendant Price Waterhouse U.S. ("PW/US") to dismiss; (d) the motion of defendant Price Waterhouse World Firm Ltd. to dismiss and to strike; (e) the motion of defendants Clark Clifford, Robert Altman, and the law firm of Clifford & Warnke (collectively the "Clifford Defendants") to dismiss; (f) the motion of defendants InterRedec, Inc., InterRedec Inc., Wesley Co., Inc., River Oaks, Inc., River Oaks Investments, Inc., Sterling Bluff, Inc., Concorde Finance & Investments, and GRP Investments N.V. (collectively the "InterRedec Defendants") to dismiss: (g) the motion of defendants First American Corporation, First American Bankshares, Inc., Jack W. Beddow, Paul G. Adams, III, and A. Vincent Scoffone (collectively the "First American Defendants") to dismiss; (h) the motion of defendant Ernst & Young U.S. ("E&Y") to dismiss; (i) the motion of defendant Fulvio Dobrich to dismiss; (h) the motion of defendant Abu Dhabi Investment Authority (ADIA") to dismiss; and (k) the motion of defendant Hill & Knowlton, Inc. ("H&K") to dismiss. Additionally, putative defendants Paul C. Warnke, John F. Kovin, David I. Granger, Harold D. Murry, Jr., JOhn G. Calendar, J. Griffin Lesher, Bryan Jay Yolles, Robert P. Reznick, Philip H. Hecht, and James C. Duff, all partners in Clifford & Warnke, have filed a motion to dismiss. However, plaintiffs added these individuals to the Complaint without first seeking leave of the Court to amend. Thus, neither these individuals, nor the motion they have filed, are presently before the Court.

to dismiss for lack of subject matter jurisdiction, on forum non conveniens grounds, or to abstain). Having considered the papers filed in connection with the motions and the arguments of counsel at hearing, the Court issues the following memorandum opinion.

I. STATEMENT OF FACTS

On July 5, 1991, banking regulators in the United Kingdom, Luxembourg, and the Cayman Islands seized the operations of the Bank of Credit and Commerce International.[2] At the time it was closed, BCCI operated 400 branches in over 70 countries and was the fifth largest private bank in the world. BCCI, S.A. will not reopen and is "hopelessly insolvent"; depositors' funds are frozen and unavailable. Potential claims against BCCI exceed its remaining assets, but the cooperative effort of liquidators in the United Kingdom, Luxembourg, and the Cayman Islands has resulted in a proposed settlement with BCCI's majority shareholders, Sheikh Zayed and the government of Abu Dhabi. The settlement contemplates a cash payment by Abu Dhabi of $ 2.2 billion, which would result in a distribution to depositors of between 25 and 40 percent of the deposits they lost.[3]

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[2] Related entities include Bank of Credit and Commerce International, S.A., Bank of Credit and Commerce International (Overseas) Ltd., Bank of Credit and Commerce International Holdings (Luxembourg) S.A., International Credit and Investment Company (Overseas) Ltd., International Credit and Investment Company Holdings, and Credit and Commerce American Holdings, N.V. and its subsidiary Credit and Commerce American Investment, B.V. (collectively "BCCI").

[3] Many additional factors will affect depositors' ultimate recovery. For example, liquidators are presently pursuing

In the United States, BCCI operated agency offices at one time in Los Angeles, San Francisco, and Beverly Hills, California; Boca Raton, Miami, and Tampa, Florida; Houston, Texas; Chicago, Illinois; New York City, New York; and Washington, D.C. At the time BCCI was closed by regulators, only the Los Angeles and New York offices were operating. Plaintiffs allege that BCCI solicited and obtained deposits in the United States through these agency offices. *See* Complaint, ¶¶ 33, 289(g). Presently, the Superintendents of Banking of New York and California have seized BCCI assets and are proceeding to settle depositor claims. BCCI assets being marshalled in the United States far exceed potential claims and only the excess will be turned over to the foreign BCCI liquidators. As a result, no BCCI depositors who had money in United States offices on July 5, 1991 will lose their deposits.[4]

Plaintiffs purport to represent approximately 1 million BCCI depositors worldwide who have lost $ 6 billion as a result of the financial collapse and regulatory seizure of BCCI. Named plaintiffs consist of United States citizens (Hamid, Curran, Khorassanchy, and Chawla);[5]

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additional claims on behalf of BCCI, including claims filed against both E&Y and various Price Waterhouse entities.

[4] Plaintiffs have not argued otherwise. They contend, however, that United States depositors presently suffer the loss of the use of their money, have suffered that loss since July 5, 1991, and will not recover interest on their deposits for this time.

[5] Additionally, United States Citizens Philip Merz and Amit Pandya seek to be added to this action as plaintiffs.

United States corporations (Soha, Inc. and Idriss Devco, Inc.); foreign corporations (S&L Gentrade, Inc. and Red Circle Investments, Ltd.); and foreign residents (Musleh, Hermans, Hasim, and Murbarek). Plaintiffs have named seventy-seven defendants on the basis of their various relationships to BCCI.[6] BCCI itself is not a defendant here because of international liquidation proceedings and a resulting bankruptcy stay entered in the United States. *See In re Petition of Brian Smouha*, No. 91-B-13569 (S.D.N.Y. Bankr.).

Plaintiffs' initial complaint alleged four claims for relief: Counts One through Three were brought under the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. sections 1962(a)/(d),[7] (c)/(d),[8] &

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[6] Plaintiffs characterize defendants as either (1) BCCI strawmen/frontmen or looters; (2) BCCI owners or founders; (3) BCCI officers or agents; (4) United States assistors or co-conspirators; (5) other United States instrumentalities; and (6) professional service providers to BCCI (*i.e.*, accountants, lawyers, and public relations firm). *See* Complaint, chart following page 47.

[7] Subjection (a) of 18 U.S.C. § 1962 provides:
It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity . . . to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise. . . .

[8] Subsection (c) of 18 U.S.C. § 1962(c) provides:
It shall be unlawful for any person employed by or associated with any enterprise . . . to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity. . . .

(b)/(d);[9] Count Four alleged a claim under the Alien Tort Statute, 28 U.S.C. § 1350.[10] On January 15, 1992, the Court issued its Order Re Dismissal and a More Definite Statement (the "Order"), in which the Court dismissed Count Four without leave to amend, but gave plaintiffs leave to amend the RICO claims contained in their 212-page second amended complaint.[11] In response to the Court's Order, plaintiffs filed their 482-page Complaint on January 20, 1992, attaching (and, in many cases, incorporating by reference) 2003 additional pages of exhibits.

The facts alleged in plaintiffs' Complaint fall into three categories: (1) BCCI's involvement in various criminal activities; (2) regulatory violations stemming from BCCI's secret ownership and control of several United

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[9] Subsection (b) of § 1962 provides:

> It shall be unlawful for any person through a pattern of racketeering activity . . . to acquire or maintain, directly or indirectly, any interest in or control of any enterprise. . . .

[10] Section 1350 provides a remedy in federal court for "any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." By its terms, the Alien Tort Statute only imposes liability for violation of a treaty or the law of nations. *See Filartiga v Pena-Irala*, 630 F.2d 876, 887-88 (2d Cir. 1980).

[11] Part of the Order was adapted from a RICO Standing Order or Case Statement issued by Judge Krenzler in *Lyman Steel Co. v. Shearson Lehman Bros., Inc.*, No. C 86-355 (N.D. Ohio Feb. 13, 1986). A similar RICO Case Statement must now accompany all RICO filings in the Southern District of California. *See* General Order No. 386, 92 Daily Journal D.A.R. 883 (Jan. 22, 1992).

States financial institutions;[12] and (3) the worldwide fraud perpetrated upon depositors, which ultimately ended in the financial collapse of BCCI. In response to the Court's Order,[13] plaintiffs allege that the defendants' violations of RICO caused them to lose their deposits as follows:

> (a) depositors were defrauded into placing their deposits into a criminal enterprise instead of a legitimate bank because BCCI falsely represented that it had substantial assets, profitability, a lawful operation and would be able to honor depositors' claims;
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> (b) the ongoing existence of BCCI's criminal enterprise would not have been possible had the defendants not helped BCCI continue to operate;[14]

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[12] BCCI's financing of "fronts" or strawmen – wealthy businessmen and rulers of middle eastern states – permitted BCCI to surreptitiously acquire and control defendant First American Bank (400 branches in six states, based in Washington, D.C.); the National Bank of Georgia (the largest bank in Georgia); CenTrust Savings (20 branches in Florida); Independence Bank (11 branches, based in Encino, California; now insolvent and voluntarily dismissed by plaintiffs as a defendant in this case), and Viking Savings & Loan (Santa Monica, California).

[13] The Court ordered plaintiffs, by appending paragraphs 342, 350 and 358 of the Complaint, to "describe the causal relationship between plaintiffs' alleged injury and *each* defendants' violation of [RICO]." *See* Order, ¶¶ 10(L), (M), and (N) (emphasis in original).

[14] The alleged assistance provided by the defendants includes the defendants' failure to publicly disclose BCCI's true nature and their assistance helping BCCI avoid detection by regulators.

(c) as a continuing operation, BCCI continued to accept plaintiffs' deposits; and

(d) because of defendants' racketeering acts (which constituted the operation of BCCI), banking regulators seized BCCI on July 5, 1991, freezing depositors' funds and causing their present losses.

See Complaint, ¶¶ 342, 350, 358.

II. ANALYSIS

A. SUFFICIENCY OF PLAINTIFFS' ALLEGATIONS

On a motion to dismiss for failure to state a claim upon which relief can be granted brought pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, the complaint must be construed in the light most favorable to the non-moving party and all of the allegations contained in the complaint are taken as true. *Jenkins v. McKeithen*, 395 U.S. 411, 421-22, 89 S. Ct. 1843, 23 L.Ed.2d 404, *reh'g denied*, 396 U.S. 869, 90 S. Ct. 35, 24 L.Ed.2d 123 (1969)[15] A Rule 12(b)(6) motion to dismiss should be granted only if "it appears beyond a reasonable doubt that the plaintiff can prove no set of facts which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S. Ct. 99, 2 L.Ed.2d 80 (1957).

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[15] However, the Court does not "necessarily assume the truth of legal conclusions merely because they are cast in the form of factual allegations." *Western Mining Council v. Watt*, 643 F.2d 618, 624 (9th Cir.), *cert. denied*, 454 U.S. 1031, 102 S. Ct. 567, 70 L.Ed.2d 474 (1981).

Despite these liberal pleading standards, certain types of pleadings require more particularity. Rule 9(b) of the Federal Rules of Civil Procedure provides that "[i]n all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity." Allegations of fraud require the pleader to detail with particularity the time, place, and manner of each act of fraud, plus the role of each defendant in each fraudulent scheme. *Lancaster Community Hosp. v. Antelope Valley Hosp. Dist.*, 940 F.2d 397, 405 (9th Cir. 1991), *cert. denied*, 112 S. Ct. 1168, 117 L.Ed.2d 414 (1992); *Schreiber Distrib. Co. v. Serv-Well Furniture Co.*, 806 F.2d 1393 (9th Cir. 1986).

Rule 9(b) ensures that allegations of fraud are specific enough to give defendants notice of the particular misconduct which is alleged to constitute the fraud charged so that they can defend against the charge and not just deny that they have done anything wrong. *Semegen v. Weidner*, 780 F.2d 727, 731 (9th Cir. 1985).[16] "[P]leading is sufficient under Rule 9(b) if it identifies 'the circumstances constituting fraud so that the defendant can prepare an adequate answer from the allegations.' " *Id.* at 735 (citation omitted). When the alleged conduct upon which a RICO claim are fraud-type predicate offenses, Rule

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[16] Rule 9(b) serves three purposes: (1) providing a defendant fair notice of the plaintiff's claim, thus enabling the defendant to prepare a defense; (2) protecting a defendant from harm to his reputation or goodwill; and (3) reducing the number of strike suits. *Di Vittorio v. Equidyne Extractive Indus., Inc.*, 822 F.2d 1242, 1247 (2d. Cir. 1987) (citing *Reingold v. Deloitte Haskins & Sells*, 599 F. Supp. 1241, 1266 (S.D.N.Y. 1984) (Rule 9(b) "inhibits the filing of a complaint as a pretext for discovery of unknown wrongs.").

9(b)'s requirement of pleading particularity applies to those allegations. *Moore v. Kayport Package Express, Inc.*, 885 F.2d 531, 541 (9th Cir. 1989).

Most of the moving defendants continue to protest what they consider a dearth of allegations specifying their role in the alleged wrongdoing.[17] However, the Court is satisfied that plaintiffs' Complaint alleges with sufficient particularity the basis for each defendants' inclusion in plaintiffs' suit. Indeed, many of plaintiffs' allegations clearly and painstakingly detail defendants' involvement with BCCI.

Additionally, plaintiffs' prior use of inherently ambiguous names such as "Price Waterhouse" and "Ernst & Young" in previous pleadings is not repeated in the Complaint. Plaintiffs have complied with the Court's Order to "distinguish between the separate firms of each organization. . . . " *See* Order, ¶ 10(B).[18] In addition to

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[17] For example, the public relations firm H&K complains that it is only alleged to have distributed a "fact sheet" in response to a magazine article about BCCI. *See* Complaint, ¶¶ 36, 334. Defendant Dobrich notes that he is only alleged to have been hired as an executive of Independence Bank in mid-1989, although plaintiffs' conspiracy allegations span sixteen years. *See* Complaint, Ex. 23. E&Y objects to its inclusion in charged misconduct that occurred over unspecified or broad spans of time, particularly since E&Y resigned as BCCI's auditor in 1987 and none of the alleged losses occurred until 1991.

[18] Though the defendant accounting firms contend that plaintiffs have merely substituted "PW/UK, PW/US and PW/Luxembourg" for each previous instance of "Price Waterhouse" and "EY/US, EY/UK, and EY/Luxembourg" for each previous instance of Ernst & Young," not all allegations contain all three entities. Plaintiffs have made some distinctions between the entities in the Complaint.

making distinctions between the accounting firm entities, plaintiffs also sufficiently allege an agency relationship between the different entities and are entitled to proceed on that basis as well.

The Court further concludes that plaintiffs adequately allege both conspiracy and aiding and abetting liability. Consequently, these allegations bar the independent evaluation of each defendants' isolated role in BCCI's collapse urged by the defendants because the Court cannot dismiss defendants who are sufficiently alleged to have been co-conspirators with those defendants whose predicate acts caused plaintiffs' injuries. *See Beltz Travel Serv., Inc. v. International Air Transport Ass'n*, 620 F.2d 1360, 1367 (9th Cir. 1980) (all conspirators are liable for the acts of their co-conspirators).

B. PLAINTIFFS' RICO CLAIMS

1. Plaintiffs' Alleged RICO Enterprises

Plaintiffs clearly state that their alleged RICO enterprises are both identical to the pattern of racketeering activity. *See* Complaint, ¶¶ 339 (BCCI enterprise and pattern, as well as associated-in-fact enterprise and pattern, are "one in the same"), 340(b) ("BCCI enterprise and association-in-fact enterprise are both "synonymous with the pattern of illegal racketeering"), 347, 348(b), 355, & 356(b). Plaintiffs' failure to allege an ascertainable structure to the RICO enterprises – separate and apart from the pattern of racketeering activity – is fatal to the allegations of these enterprises. As the Ninth Circuit noted in *United Energy Owners Comm., Inc. v. United States Energy*

Management Sys., Inc., 837 F.2d 356, 362 n.13 (9th Cir. 1988),

> [t]he *Allington* [*v. Carpenter*, 619 F. Supp. 474 (C.D. Cal. 1985)] court correctly noted that under [*United States v.*] *Turkette* [452 U.S. 576, 101 S. Ct. 2524, 69 L.Ed.2d 246 (1981),] every private plaintiff asserting a violation of RICO section 1962(c) must "plead an enterprise apart from the underlying pattern of racketeering activity." 619 F. Supp. at 469 (citing *United States v. Bledsoe*, 674 F.2d 647, 665 (8th Cir.) (RICO enterprise must have "an 'ascertainable structure' distinct from that inherent in the conduct of a pattern of racketeering activity."), *cert. denied*, 459 U.S. 1040, 103 S. Ct. 456, 74 L.Ed.2d 608 (1982)).

See also Sigmond v. Brown, 645 F. Supp. 243, 246 (C.D. Cal. 1986), *aff'd*, 828 F.2d 8 (9th Cir. 1987) (no separate enterprise where plaintiff had stated that the sole purpose of the enterprise was to conduct the alleged racketeering activity). Thus, plaintiffs' RICO claims fail to state a claim because the alleged enterprises have no ascertainable structure distinct from the alleged pattern of racketeering activity.[19]

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[19] The Court's dismissal of substantive RICO claims constitutes a dismissal of the conspiracy alleged under section 1963(d) as well. *See Condict v. Condict*, 826 F.2d 923, 927 (10th Cir. 1987) ("any claim under section 1962(d) based on a conspiracy to violate the provisions of 18 U.S.C. section 1962(a), (b), or (c) must necessarily fail if the substantive claims are themselves deficient").

2. Plaintiffs' "Reinvestment Injury" Claim Under Section 1962(a)

Plaintiffs section 1962(a) RICO claim is based solely on the use or investment, more accurately characterized as "reinvestment," of racketeering income by defendants in their own continuing operations. *See* Complaint, ¶ 341(f).[20] The causal nexus to plaintiffs' injury alleged by plaintiffs is that the reinvestment of racketeering income in each defendants' own operations permitted each defendant to continue to exist and engage in the illegal conduct which permitted BCCI to continue to operate without detection and solicit deposits from plaintiffs. Plaintiffs rely upon *Schreiber Distrib. Co. v. Serv-Well Furniture Co.*, 806 F.2d 1393 (9th Cir. 1986), to argue that each defendants' reinvestment of racketeering income in its own operation states a claim under section 1962(a). *See id.* at 1398 ("Logic dictates that a corporation, receiving income from a pattern of racketeering in which it has participated as a principal, can invest that income in its own operations.") (citing *Pennsylvania v. Derry Constr. Co.*, 617 F. Supp. 940, 943 (W.D. Pa. 1985)). The *Schreiber* court expressly held that "where a corporation engages in racketeering activities and is the direct or indirect beneficiary of the pattern of racketeering activity, it can be both the 'person' and the 'enterprise' under section 1962(a)." *Id.*

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[20] The Court's Order required plaintiffs to amend paragraph 341 of the pleading and "(i) [s]tate specifically who received income derived from the pattern of racketeering activity; (ii) [d]escribe the use or investment of such income and the enterprise in which it was used or invested; and (iii) [s]tate specifically how the victims were injured by reason of the use or investment of racketeering income." Order, ¶ 10(H).

However, a question not considered by *Schreiber* is whether reinvestment can cause plaintiffs' injury in a section 1962(a) claim. Section 1964(c) of RICO provides a private right of action to persons injured "by reason of a violation of section 1962." In *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 105 S. Ct. 3275, 3285-86, 87 L.Ed.2d 346 (1985), the Supreme Court held that a plaintiff has standing to bring a RICO claim under section 1962(c) only to the extent that the conduct constituting the RICO violation caused injury to his business or property. Thus, under section 1962(c), an allegation of a pattern of racketeering activity which causes injury to plaintiff sufficiently states a cause of action.

By contrast, the gravamen of the offense under Section 1962(a) is not the underlying racketeering activity itself, but the subsequent use and investment of proceeds obtained through the racketeering activity. Thus, to state a claim under section 1964(c) for a violation of section 1962(a), plaintiffs must allege injury by the use or investment of the proceeds of racketeering activity. *See, e.g., Ouaknine v. MacFarlane*, 897 F.2d 75, 82 (2d Cir. 1990); *Rose v. Bartle*, 871 F.2d 331, 357-58 (3d Cir. 1989); *Grider v. Texas Oil & Gas Corp.*, 868 F.2d 1147, 1149 (10th Cir.), *cert. denied*, 493 U.S. 820, 110 S. Ct. 76, 107 L.Ed.2d 43 (1989); *U.S. Concord, Inc. v. Harris Graphics Corp.*, 757 F. Supp. 1053, 1060 (N.D. Cal. 1991); *In re U.S. Grant Hotel Assoc. Ltd. Sec. Litig.*, 740 F. Supp. 1460, 1469 (S.D. Cal. 1990). *Contra In re National Mortgage Equity Corp. Mortgage Pool Certificates Sec. Litig.*, 682 F. Supp. 1073 (C.D. Cal. 1987) ("*NMEC*").[21]

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[21] The Ninth Circuit declined to reach this issue in *Reddy v. Litton Indus., Inc.*, 912 F.2d 291 (9th Cir. 1990), *cert. denied*, 112 S.

Plaintiffs assert that defendants' reinvestment in their own operations perpetuated the RICO enterprise and permitted the racketeering activity to continue. *See* Complaint ¶ 341(f). This reinvestment injury theory is simply another way of stating that the predicate acts caused plaintiffs' injury and does not state an injury separately stemming from the reinvestment sufficient to state a claim under section 1962(a). *See U.S. Concord, Inc.*, 757 F. Supp. at 1060; *Williamson v. Simon & Schuster*, 735 F. Supp. 565, 568-68 (S.D.N.Y. 1990). For these reasons, plaintiffs' section 1962(a) claim is dismissed without leave to amend.[22]

Ct. 332, 116 L.Ed.2d 272 (1991), but recognized that three of four circuit courts and a majority of district courts have required section 1962(a) plaintiffs to show injury from the use or investment of racketeering income rather than from the predicate acts alone. *Id.* at 295-96. The court also noted that Judge Tashima acknowledged the split of opinion on the issue and that his opinion in *NMEC*, 682 F. Supp. at 1073, was issued without the benefit of the appellate decisions in the Second, Third, and Tenth Circuits. *Reddy*, 912 F.2d at 296 n.6.

[22] In response to defendants' objections that they had not invested in BCCI, the Court previously observed that the complaint sufficiently alleged the use or investment of income in an enterprise under § 1962(a), "at least to the extent the enterprise is defined as the associated-in-fact enterprise consisting of the BCCI Banks and the defendants listed in the complaint." Order, ¶ 3. The Court did not thereby determine that this claim was legally sufficient in all respects; the present challenge to the legal sufficiency of the claim was not before the Court.

C. ARE PLAINTIFFS' CLAIMS DERIVATIVE OR DIRECT?

Defendants contend that plaintiffs lack standing because their claims are derivative of BCCI rather than direct.[23] Plaintiffs do not contest the legal principles cited by defendants; rather, plaintiffs merely insist that their claims are direct. However, plaintiffs' RICO claims are derivative of BCCI and plaintiffs lack standing to prosecute them. *See, e.g., Adato v. Kagan*, 599 F.2d 1111, 1117 (2d Cir. 1979) (citing 1 Michie, *Banks and Banking* § 69 at 289-91 (1973), for the general rule that "wrongdoing by bank officers that adversely affects all depositors creates a liability which is an asset of the bank and only the bank or its receiver may sue for its recovery."); *Sax v. World Wide Press, Inc.*, 809 F.2d 610, 613 (9th Cir. 1987) (citing 12B W. Fletcher, *Cyclopedia of the Law of Private Corporations*, § 5911 (rev. perm. ed. 1984), for the general rule that "an action enforces a corporate right 'if the gravamen of the complaint is injury to the corporation, or to the whole body of its stock or property without any severance or distribution among individual holders.' ");[24] *In re Sunrise Sec. Litig.*, 916 F.2d 874 (3d Cir. 1990) (a depositor's loss in

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[23] This issue is a question of law for the Court. *See In re Sunrise Sec. Litig.*, 916 F.2d 874, 882 (3d Cir. 1990) ("Whether a claim is individual or derivative is determined from the body of the complaint rather than from the label employed by the parties.").

[24] Although a depositor is a creditor of a bank or savings and loan, "courts have relied on the principles applicable in shareholder suits in deciding whether deposits and other creditors have stated a claim that may be bought individually." *In re Sunrise Sec. Litig.*, 916 F.2d at 880 (citations omitted).

an insolvent institution is a derivative claim that can only be brought on behalf of the institution by the receiver); *Sparling v. Hoffman Constr. Co.*, 864 F.2d 635, 640-41 (9th Cir. 1988) (dismissing shareholder and guarantor RICO claims because they were derivative).[25]

Cases cited by plaintiffs which permitted direct claims to proceed are all distinguishable. For example, in *Ashland Oil, Inc. v. Arnett*, 875 F.2d 1271, 1279-80 (7th Cir. 1989), the court permitted suit against officers of a bankrupt corporation because the injury suffered by the RICO plaintiffs was significantly different than the injury suffered by creditors in general.[26] Similarly, in *University of Maryland v. Peat Marwick Main & Co.*, 923 F.2d 265 (3d Cir. 1991), plaintiffs were policyholders of an insolvent insurance company whose RICO claim against the insurer's independent auditors was direct and not derivative based on a breach of duties owed by the defendant directly to

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[25] The Court rejects plaintiffs' argument that RICO's lack of separate standing requirements permits recovery for indirect injury that would otherwise be characterized as derivative. Such a result would impermissibly expand federal jurisdiction over suits that are barred under other substantive legal principles. *See Warren v. Manufacturers Nat'l Bank*, 759 F.2d 542, 545 (6th Cir. 1985).

[26] Indeed, the Seventh Circuit contrasted *Ashland Oil* with the result reached by the district court in *Dana Molded Prods., Inc. v. Brodner*, 58 Bankr. 576 (N.D. Ill. 1986), which barred a RICO claim as derivative because "the predicate acts of racketeering on which plaintiff bases its claim all involve fraudulent transfers of money [from the bankrupt corporation] and the injuries plaintiff asserts are indistinguishable from those suffered by [the bankrupt corporation] itself." *Id.* at 579. *Dana Molded Products*, rather than *Ashland Oil*, is more akin to the facts facing the Court here.

the plaintiffs, not to the insolvent insurer. *Id.* at 273. Neither of these cases support a proposition other than that already recognized by the Court: "Absent allegations of a special duty to the depositors or injury distinct from that suffered by other depositors, plaintiffs' claims fail to state a claim upon which relief can be granted." *See* Order, ¶ 2 & n.1 (citing *Sparling*, 864 F.2d at 640).[27]

Plaintiffs also contend that the result reached by the Third Circuit in *Sunrise* does not apply to this case and that *Harmsen v. Smith*, 542 F.2d 496 (9th Cir. 1976), *cert. denied*, 464 U.S. 822, 104 S. Ct. 89, 78 L.Ed.2d 97 (1983), is the controlling precedent.[28] However, *Harmsen* held that a

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[27] The Court invited plaintiffs to plead the one condition that would permit them to avoid this result: a special duty to the depositors that would give them direct claims. The only other condition that would permit a direct suit – special injury not suffered by all deposits – cannot apply in these circumstances where the plaintiffs are, by definition, the putative class of all depositors. *See* Order, ¶ 2 at 2-3 & n.1.

Plaintiffs allege a "special duty" exists because all the defendants were aware of the criminal conduct of BCCI and the risk to depositors' funds, and since public disclosure of this information would have prevented depositors from placing their funds in BCCI, defendants had a duty to disclose their knowledge of BCCI's fraudulent operation. *See* Complaint, ¶¶ 1(a), 17(b) & (c), 37. Plaintiffs' conclusory statements neither change the character of plaintiffs' claims nor establish that a special duty exists. *See Western Mining Council v. Watt*, 643 F.2d 618, 624 (9th Cir. 1981), *cert. denied*, 454 U.S. 1031, 102 S. Ct. 567, 70 L.Ed.2d 474 (1981). Because the plaintiffs have failed to adequately plead a special duty, the Court finds that neither a special duty nor a distinct injury exists that might provide an exception to a bar of plaintiffs' derivative claims.

[28] The Third Circuit in *Sunrise* expressly declined to follow *Harmsen*, noting first that the result reached by the Ninth Circuit

depositor who has lost funds in an insolvent institution as a result of fraud by the bank's officers states a claim for direct injury under the National Bank Act, 12 U.S.C. § 93. Not only is *Harmsen*'s holding expressly limited to actions brought under section 93 of the National Bank Act, *Harmsen*, 542 F.2d at 501-02, but the result in *Harmsen* appears inconsistent with the principles it purports to apply. *See supra*, n.28; *compare Leach v. Federal Deposit Ins. Corp.*, 860 F.2d 1266, 1271-74 (5th Cir. 1988), *cert. denied*, 491 U.S. 905, 109 S. Ct. 3186, 105 L.Ed.2d 695 (1989) (describing its result as consistent with *Harmsen*, the court held that absent special duty or distinct injury, minority shareholder's suit under *both* section 93 of the National Bank Act and RICO is derivative and cannot be maintained).

Finally, plaintiffs contend that *Sparling*'s rule barring derivative suits does not apply where fraud *by* a corporation has occurred, as opposed to fraud *on* a corporation, where the corporation may sue to recover for harm done to it. Plaintiffs argue that their claims are direct and appropriate for class-action prosecution under Rule 23 of the Federal Rules of Civil Procedure because (a) unlike those cases finding claims to be derivative, no liquidator exists to prosecute BCCI claims; (b) even if such a trustee existed, claims belonging to the depositors could not be

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in *Harmsen* ran counter to the general rule, recognized in *Harmsen*, that shareholders may not recover directly for the injuries sustained by the bank but must demonstrate injury to themselves "as distinct from the bank." *In re Sunrise Sec. Litig.*, 916 F.2d at 886. Further, the Third Circuit observed that the result in *Harmsen* "has not been adopted by other courts." *Id.* at 886 & n.12 (citing cases).

prosecuted by such a trustee; and (c) prosecution by the trustee of the depositors' claims would be subject to an *in pari delicto* defense, since BCCI was not a victim but a perpetrator.

a. **Existing Receiver**. Since the assumption of a receiver who will represent the depositors' interest underlies all of the cases holding claims to be derivative, plaintiffs contend that the cases are inapposite because no liquidator exists that will prosecute the claims of BCCI. This assertion is belied by the appointment of the Joint Provisional Liquidators by the High Court in London. Plaintiffs' assertion that the liquidators will not prosecute these claims is belied by the proposed settlement with Abu Dhabi for $ 2.2 billion and recent claims filed against Ernst & Young.

b. **Trustee's Standing**. The cases relied upon by plaintiffs, *i.e.*, *Williams v. California 1st Bank*, 859 F.2d 664, 667 (9th Cir. 1988); *Caplin v. Marine Midland Grace Trust Co.*, 406 U.S. 416, 92 S. Ct. 1678, 32 L.Ed.2d 195 (1972); *In re Lendvest Mortgage, Inc.*, [1990 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 73,595 at 97,812 (N.D. Cal. July 27, 1990), are inapposite and involve circumstances where plaintiffs had individual causes of action that could not be pursued by the corporation's representatives on their behalf.

c. ***In Pari Delicto* Defense**. Plaintiffs, relying upon *Cenco, Inc. v. Seidman & Seidman*, 686 F.2d 449 (7th Cir.), *cert. denied*, 459 U.S. 880, 103 S. Ct. 177, 74 L.Ed.2d 145 (1982), contend that where the corporation is the perpetrator of a fraud and benefits from it, the trustee stands in the corporation's shoes and cannot maintain a claim like the one asserted by plaintiffs here. However, the

Seventh Circuit later limited the result in *Cenco* to situations where the fraud benefits the corporation. *See Schacht v. Brown*, 711 F.2d 1343, 1347-48 (7th Cir.), *cert. denied*, 464 U.S. 1002, 104 S. Ct. 508, 78 L.Ed.2d 698 (1983); *see also Kempe v. Monitor Intermediaries, Inc.*, 785 F.2d 1443, 1444 (9th Cir. 1986) (in a case "indistinguishable from" *Schacht*, the court found that the liquidator had standing to sue under RICO). Here, BCCI did not benefit from the dissipation of its assets; indeed, plaintiffs' repetitively assert that BCCI is "hopelessly insolvent."[29]

D. SUBJECT MATTER JURISDICTION

Before considering the issues raised by the motions of PW/UK and ADIA to dismiss for lack of subject matter jurisdiction, the Court must first evaluate plaintiffs' claims in light of two requirements imposed by RICO: (1) proximate cause, and (2) cognizable injury.

1. RICO's Proximate Cause Requirement

Section 1964 of RICO, which provides civil remedies for violation of RICO, states that "[a]ny person injured in his business or property *by reason of* a violation of section 1962 . . . may sue . . . " 18 U.S.C. § 1964(c) (emphasis

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[29] Additionally, *in pari delicto* is an equitable defense. When application of the doctrine is not in the public interest, recovery is permitted. *In re Leasing Consultants, Inc.*, 592 F.2d 103, 110 (2d Cir. 1979); *see In re Wedtech Corp.*, 88 Bankr. 619, 622 (Bankr. S.N.D.Y. 1988) ("a trustee's ability to obtain a recovery for an estate and its blameless creditors may not be denied by the prepetition wrongful conduct of the debtor").

added). Thus, the harm alleged must be "by reason of," or proximately caused by, the predicate acts. *See Holmes v. Securities Investors Protection Corp.*, 112 S. Ct. 1311, 117 L.Ed.2d 532 (1992); *Brandenburg v. Seidel*, 859 F.2d 1179, 1188 (4th Cir. 1988) (defendant is responsible for injuries flowing from defendant's predicate act liability).

Plaintiffs state a RICO claim only to the extent that the harm they suffer is proximately caused by the predicate acts of racketeering they allege. *Holmes*, 112 S. Ct. 1311, 117 L.Ed.2d 532; *Reddy v. Litton Indus., Inc.*, 912 F.2d 291, 294 (9th Cir. 1990), *cert. denied*, 112 S. Ct. 332, 116 L.Ed.2d 272 (1991); *see also Bastian v. Petren Resources Corp.*, 892 F.2d 680, 686 (7th Cir.), *cert. denied*, 110 S. Ct. 2590, 110 L.Ed.2d 270 (1990) (unless plaintiffs are worse off as a result of defendant's acts than they would have been in the absence of defendant's acts, the causal nexus required is absent); *compare O'Malley v. O'Neill*, 887 F.2d 1557 (11th Cir. 1989), *cert. denied*, 110 S. Ct. 2620, 110 L.Ed.2d 641 (1990); *Burdick v. American Express Co.*, 865 F.2d 527 (2d Cir. 1989); *Sperber v. Boesky*, 849 F.2d 60 (2d Cir. 1988).

Under the circumstances, proximate cause is a question of law for the Court. *Benefiel v. Exxon Corp.*, 92 Daily Journal D.A.R. 3972, 3973 (9th Cir. Mar. 25, 1992) ("[W]here causation cannot reasonably be established under the facts alleged by a plaintiff, the question of proximate cause is one for the court."); *see Brandenburg*, 859 F.2d at 1189 (proximate cause is a question for the court). Consequently, the Court can determine whether plaintiffs' injuries are sufficiently connected to the alleged RICO predicate acts to state a claim, considering factors such as foreseeability of the particular injury, the

intervention of other independent causes, and the factual directness of the causal connection. *Id.* (citing Restatement (Second) of Torts § 548A comments a, b).

Here, plaintiffs allege twenty-eight specific predicate acts of racketeering. *See* Complaint, ¶¶ 350(f)-(ag).[30] Few of these alleged acts, however, have the requisite causal connection to the loss of plaintiffs' deposits. The harm inflicted upon plaintiffs stems solely from the looting of depositors' funds, made possible because of allegedly fraudulent statements made regarding BCCI's financial condition and falsified account information that hid BCCI's true financial condition. *See* Complaint, ¶¶ 350(h); 350(o); 350(ad); 350(af); *see also id.* ¶¶ 291(a)-(x), (aa)-(ao); ¶¶ 296-308. The alleged acquisition of control in United States banks, *id.*, ¶¶ 350(f) & (y), also proximately caused plaintiffs' loss, but only insofar as BCCI dispatched depositors' money to strawmen or frontmen for illegitimate purposes (assuming that the "infiltration of the United States banking system" resulted in a net cost to BCCI, which is not clear in the Complaint.).[31]

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[30] In the Order, the court required plaintiffs to "[a]ppend[] paragraph 350 of the complaint" and "describe the causal relationship between plaintiffs' alleged injury and *each* defendants' violation of: (i) specific predicate acts; and (ii) RICO section 1962(c) and (d). Order, ¶ 10(M) (emphasis in original).

[31] Several alleged predicate acts involving the United States banks obviously enriched BCCI rather than depleted the deposits' funds and could not have caused deposit losses. *E.g.*, *id.*, ¶¶ 350(aa) (causing defendant First American to funnel $ 220 million to BCCI); 350(l) (causing numerous United States banks that BCCI illegally acquired or controlled to make illegal political contributions in order to gain political favor for BCCI).

On the other hand, the following predicate acts of racketeering, allegedly committed by all of the defendants, did not proximately cause plaintiffs' losses:[32]

> (1) acquiring or controlling numerous United States banks, *id.*, ¶ 350(f) & (y), and then covering up that ownership, *id.*, ¶ 350(r);
>
> (2) financing illegal drug transactions, *id.*, ¶ 350(g);
>
> (3) smuggling coffee into the United States, *id.*, ¶ 350(i);
>
> (4) assisting former heads of state Manuel Noriega and Alan Garcia to loot the national treasuries of Panama and Peru; *id.*, ¶ 350(j), (v) & (ae);
>
> (5) laundering money and improperly pleading guilty to that charge to avoid further prosecution, *id.*, ¶ 350(k) & (ac);
>
> (6) causing the United States banks BCCI illegally acquired or controlled to make illegal political contributions, *id.*, ¶ 350(l);

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[32] Plaintiffs also allege, as predicate acts of racketeering, that BCCI bribed Peruvian bankers to obtain deposits from Peru's Central Bank, *id.*, ¶ 350(w) & (ab), and bribed a former BCCI employee in London to keep him from blowing the whistle on BCCI's illegal conduct, *id.*, ¶ 350(ab). However, to qualify as RICO predicate acts, conduct must be indictable or punishable under United States laws. Since bribery under 18 U.S.C. § 201 only applies to "public officials," *see* 18 U.S.C. § 201(a)(1), a group to which Peruvian bankers and London BCCI employees do not belong, this conduct is not racketeering activity under RICO. *See Peters v. Welsh Dev. Agency*, 1991 U.S. Dist, LEXIS 12174 (N.D. Ill. Aug. 29, 1991).

(7) assisting arms smuggling to Iran, *id.*, ¶ 350(m);

(8) delaying investigation into BCCI's United States conduct by buying political favor, *id.*, ¶ 350(n);

(9) securities fraud committed by CenTrust, *id.*, ¶ 350(p);

(10) falsifying CenTrust's financial condition and artificially inflating CenTrust's financial condition, delaying its regulatory seizure, *id.*, ¶ 350(q) & (z);

(11) illegally funneling $3 million from a telemarketing scheme out of the United States, *id.*, ¶ 350(s);

(12) financing the sale of French-manufactured aircraft owned by Argentina to third world countries, *id.*, ¶ 350(t);

(13) financing international terrorism, *id.*, ¶ 350(u);

(14) assisting in the sale of Jordanian helicopters to Guatemala, *id.*, ¶ 350(x); and

(15) BCCI's illegal acceptance of deposits in its United States agency offices, *id.*, ¶ 350(ag).[33]

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[33] The fact that BCCI accepted plaintiffs' deposits, whether that transaction is characterized as legal or illegal, will always be a necessary element of any but-for causation link but it is not the proximate cause of plaintiffs' loss. *See Brandenburg*, 859 F.2d at 1189 ("[A]s a factual matter, plaintiffs would not have lost any interest on their deposits but for having made them in the first place.").

Indeed, plaintiffs themselves recognize that the victims of many of these predicate acts were not the depositors but others, including BCCI, *id.*, ¶ 350(h), the government of Peru, *id.*, ¶ 350(v), the American taxpayers, *id.*, ¶ 350(z), and defendant First American. *Id.*, ¶ 350(aa).

By including allegations of BCCI's criminal activities and United States banking violations in the Complaint, plaintiffs purport to have an interest in far more conduct, engaged in by many more defendants, than those which proximately caused the loss of their deposits.[34] To include defendants' United States activity in their causal chain, plaintiffs allege that their injuries were caused by (a) acts of the defendants here in United States that helped avoid detection by United States banking regulators and permitted BCCI's illegal activities in the United States (including the solicitation of deposits) to continue; (b) the eventual discovery by United States regulators of BCCI's illegal conduct in the United States banking industry; and (c) the role of United States regulators in prompting overseas regulators to close BCCI. *See* Complaint, ¶¶ 342, 350, & 358.[35] However, plaintiffs' "causal" allegations implicating the activities of the defendants in the United States and the role United States regulators played in BCCI's seizure do not comport with plaintiffs' factual

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[34] For example, though plaintiffs have sought the default of deposed Panamanian dictator Manuel Noriega, Noriega's alleged misconduct, *i.e.*, looting the national treasury of Panama, has no nexus whatsoever to plaintiffs' losses, let along being the proximate cause of their losses.

[35] These causal allegations were specifically ordered by the Court. *See supra* n.13.

description of the events leading up to the seizure. *See* Complaint, ¶ 296 at 240 (inquiries from the Bank of England led to the discovery of massive fraud at BCCI and the subsequent regulatory seizure; United States regulators were not involved).[36]

2. Plaintiffs Lack Injuries That Support RICO Claims

Injury is the *sine qua non* of recovery by plaintiffs on their RICO claims. *Kaiser Cement Corp. v. Fischbach & Moore, Inc.*, 793 F.2d 1100, 1104 (9th Cir. 1986), *cert. denied*, 479 U.S. 949, 107 S. Ct. 435, 93 L.Ed.2d 384 (1986) (citing *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 105 S. Ct. 3275, 3286, 87 L.Ed.2d 346 (1985)). Without injury, plaintiffs cannot maintain their RICO claims. *See John L. Motley Assocs., Inc. v. Rumbaugh*, 104 Bankr. 683 (E.D. Pa. 1989) (no standing to assert RICO claim if claim can be satisfied from bankruptcy estate because plaintiff cannot show requisite "injury"); *Banker's Trust Co. v. Rhoades*, 859 F.2d 1096, 1106 (2d Cir. 1988), *cert. denied*, 490 U.S. 1007, 109 S. Ct. 1642, 104 L.Ed.2d 158 (1989) (where plaintiffs' claims against former officers of insolvent corporation overlapped with claims asserted by its trustee in bankruptcy, plaintiffs' damages were "unrecoverable," "speculative,"

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[36] Significantly, no United States representative participated in the College of Regulators, the regulatory body that undertook regulation of BCCI's activities. This substantial regulatory interest by European authorities began as early as 1988, independently of United States regulatory activities. *See* Testimony of Gerald Corrigan before the House Banking Comm. (Sept. 18, 1991) (Abu Dhabi Motion, Ex. 3).

and "unprovable"; plaintiffs' injury was wholly dependent upon the trustee's lack of recovery); *Barnett v. Stern*, 909 F.2d 973, 977 n.4 (7th Cir. 1990) (RICO claims are premature where it was uncertain whether plaintiffs would satisfy their claims from the bankruptcy estate); *L'Europeene de Banque v. La Republica de Venezuela*, 700 F. Supp. 114, 118-19 (S.D.N.Y. 1988). All BCCI depositors lack the requisite injury to proceed with RICO claims at this time.[37]

Plaintiffs distinguish *Bankers Trust* and argue that it should not apply because the Second Circuit applied a "discovery of injury" accrual to a RICO cause of action and stated that "refusal to award damages as too speculative is equivalent to holding that no cause of action has yet accrued." *Id.* at 1106 (citing *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 339, 91 S. Ct. 795, 806, 28 L.Ed.2d 77 (1971)). In contrast, plaintiffs contend that a RICO claim accrues in the Ninth Circuit when the plaintiff has "actual or constructive knowledge of the fraud." *Beneficial Standard Life Ins. Co. v. Madariaga*, 851 F.2d 271, 275 (9th Cir. 1988). However, a more precise statement of the rule is that the limitations period in the

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[37] Certain putative class plaintiffs' claims may never suffer injury giving rise to a RICO claim. In the United States, BCCI assets held by the Superintendents of Banking of New York and California are being distributed to depositors. Since available assets in both states far exceed political claims and only the excess will be turned over the foreign BCCI liquidators, no BCCI deposits who had money in United States offices on July 5, 1991 will lose their deposits. Similarly, depositors in Pakistan and Oman may not lose any of their deposits because those governments have announced their intention to insure depositor losses.

Ninth Circuit begins to run " 'when the plaintiff knows or has reason to know of the *injury* which is the basis for his action.' " *Beneficial Standard Life*, 851 F.2d at 274 (citing and approving the accrual rule stated in *Compton v. Ide*, 732 F.2d 1429, 1433 (9th Cir. 1984)) (emphasis added); *State Farm Mutual Auto Ins. Co. v. Ammann*, 828 F.2d 4, 5 (9th Cir. 1987) (same). Accordingly, plaintiffs' distinction does not avoid the Court's application of *Bankers Trust* to their RICO claims.[38]

3. Extra-Territorial Jurisdiction

While Congress certainly has the authority to enact laws that reach conduct occurring outside the territorial boundaries of the United States, whether Congress has in fact exercised that authority is a question of statutory construction. *EEOC v. Arabian Am. Oil Co.*, 111 S. Ct. 1227, 1230, 113 L.Ed.2d 274 (1991); *Republic of Phillipines v. Marcos*, 818 F.2d 1473, 1478 (9th Cir. 1987), *on reh'g*, 862 F.2d 1355 (9th Cir. 1988) (thefts occurring in the Phillipines "quite probably" not reached by RICO and finding jurisdiction solely on the basis of acts occurring in the United States). However, there is a strong presumption against extra-territorial application of any federal statute

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[38] Additionally, plaintiffs attempt to distinguish *John L. Motley Assocs., Banker's Trust, Barnett*, and *L'Europeene de Banque* on the grounds that, unlike the case before the Court, (1) full recovery was certain in the bankruptcy proceedings; (2) the trustees were appointed pursuant to an orderly scheme, *e.g.*, the U.S. Bankruptcy laws; and (3) rulings that plaintiffs stated no RICO injury did not end those plaintiffs' suits. These contentions are either factually incorrect or unpersuasive.

and unless a contrary intent appears, the statute is meant to apply only within the territorial jurisdiction of the United States. *See EEOC v. Arabian Am. Oil Co.*, 111 S. Ct. 1227, 1230, 113 L.Ed.2d 274 (1991) (Title VII does not apply extra-territorially); *Independent Union of Flight Attendants v. Pan Am. World Airways, Inc.*, 923 F.2d 678, 680-82 (9th Cir. 1991), *op. withdrawn and appeal dismissed on other grounds*, 92 Daily Journal D.A.R. 4909 (9th Cir. Apr. 10, 1992) (National Railway Labor Act does not apply extra-territorially).[39]

To determine whether foreign conduct vests the Court with subject matter jurisdiction requires the Court to undertake three separate inquiries: (1) the effect or intended effect on the foreign commerce of the United States; (2) the type and magnitude of the alleged illegal behavior; and (3) the appropriateness of exercising extra-territorial jurisdiction in light of considerations of international comity and fairness. *Timberlane Lumber Co. v. Bank of Am., N.T. & S.A.*, 749 F.2d 1378, 1381 (9th Cir. 1984), *cert. denied*, 472 U.S. 1032, 105 S. Ct. 3514, 87 L.Ed.2d 643 (1985) (citing *Timberlane Lumber Co. v. Bank of Am., N.T. & S.A.*, 549 F.2d 597, 613 (9th Cir. 1976) (*Timberland I*)).[40]

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[39] When a court encounters activity that is predominately foreign, it must question whether "Congress would have wished the precious resources of United States courts and law enforcement agencies to be devoted to them rather than leave the problem to foreign countries. *Bersch v. Drexel Firestone, Inc.*, 519 F.2d 974, 985 (2d Cir.), *cert. denied*, 423 U.S. 1018, 96 S. Ct. 453, 46 L.Ed.2d 389 (1975).

[40] A motion to dismiss for lack of subject matter jurisdiction is generally treated as a Rule 12(b)(1) "speaking motion" and

Assuming *arguendo* that the first two *Timberlane I* elements are met here, the Court must then determine "whether the interests of, and links to, the United States – including the magnitude of the effect on American foreign commerce – are sufficiently strong, vis-a-vis those of other nations, to justify an assertion of extraterritorial authority." *Timberlane I*, 549 F.2d at 613. This determination requires the Court to consider seven factors:

> (1) the degree of conflict with foreign law or policy, (2) the nationality or allegiance of the parties and the locations or principal places of businesses or corporations, (3) the extent to which enforcement by either state can be expected to achieve compliance, (4) the relative significance of effects on the United States as compared with those elsewhere, (5) the extent to which there is explicit purpose to harm or affect

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summary judgment treatment under Rule 56 of the Federal Rules of Civil Procedure is not required. *Trentacosta v. Frontier Pac. Aircraft Indus., Inc.*, 813 F.2d 1553, 1558 (9th Cir. 987); *see McCarthy v. United States*, 850 F.2d 558 (9th Cir. 1987); *cert. denied*, 489 U.S. 1052, 109 S. Ct. 1312, 103 L.Ed.2d 581 (1988) (a court is not restricted to the face of the pleadings when considering a Rule 12(b)(1) motion but may review any evidence that might resolve factual disputes concerning the existence of jurisdiction).

If the Court were to resolve the question of jurisdiction on either of the first two parts of the *Timberlane I* test, however, the issues might be sufficiently intertwined with the merits of the treatment. *Timberlane Lumber Co. v. Bank of Am. N.T. & S.A.*, 749 F.2d 1378, 1381 (9th Cir. 1984). On the other hand, refusal to exercise jurisdiction under the third part of the *Timberlane I* test need not directly implicate the merits of the case and Rule 12(b)(1) dismissal would be proper when the case is dismissed on that basis. *Id.*

> American commerce, (6) the foreseeability of such effect, and (7) the relative importance to the violations charged of conduct within the United States as compared with conduct abroad.

Id. at 614; *see Vespa of Am. Corp. v. Bajaj Auto Ltd.*, 550 F. Supp. 224 (N.D. Cal. 1982). Since only racketeering acts that are predominantly foreign caused plaintiffs' losses, and United States depositors will never suffer any injury because no United States depositors will be lost, the exercise of subject matter jurisdiction over this case would be improper.

a. **Degree of conflict with foreign law or policy**. This element of *Timberlane I*'s test is usually applied in antitrust cases, where foreign policies and market systems often run counter to those policies expressed in United States antitrust law. RICO, on the other hand, prohibits acts that are – for the most part – prohibited everywhere.[41] However, the prosecution of plaintiffs' RICO claims here has the potential to interfere with the orderly liquidation of BCCI, presently proceeding in the United Kingdom, Luxembourg, and the Cayman Islands (where BCCI's main operations existed), as well as in many of the sixty nine countries where BCCI accepted deposits. This action certainly conflicts with those foreign proceedings.

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[41] Plaintiffs' conclusion, however, that *Timberlane* is therefore inapplicable to this case does not follow. Many key provisions of RICO were patterned after the antitrust laws and are construed by analyzing antitrust jurisprudence. Thus, the *Timberlane I* test applies to plaintiffs' RICO claims.

b. **Nationality or allegiance of the parties and the locations or principal places of businesses or corporations.** Few of the one million plaintiffs deposited money in United States offices of BCCI. The defendants whose conduct principally contributed to plaintiffs' losses are all foreign. Additionally, the locations or principal places of the relevant businesses or corporations are all foreign. By including the infiltration of the United States banking system by BCCI in their RICO claim, plaintiffs confuse the true nature of their looting claim and the appearance that an abundance of relevant activity and parties exist in the United States is misleading. Plaintiffs' argument that the American banks are like subsidiaries of BCCI that weigh in favor of exercising jurisdiction here is wrong.

c. **Degree to which enforcement by either state can be expected to achieve compliance.** It would be very difficult, if not impossible, for plaintiffs to enforce any judgment that might be entered by the Court here in many of the sixty-eight other countries where BCCI accepted deposits.[42] Furthermore, the possibility that the Court's decisions may not have preclusive effect outside United States boundaries, particularly after what promises to be lengthy and expensive litigation, makes the exercise of extraterritorial jurisdiction here improper.

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[42] The Court has considered expert opinions on the enforceability of a RICO judgment in the six countries where BCCI chiefly operated – the United Kingdom, Hong Kong, Luxembourg, the Grand Cayman Islands, Bahrain, and the United Arab Emirates – as well as thirty-eight additional countries.

d. **Relative significance of effects on the United States as compared with those elsewhere.** Plaintiffs contend that the criminal conduct charged against BCCI in the United States and the guilty pleas entered by BCCI here not only show the influence BCCI had in the United States, but that the guilty pleas would be admissible in plaintiffs' RICO suit and would have preclusive effect. Plaintiffs' argument is faulty because the conduct alleged in criminal cases in the United States did not cause plaintiffs' loss, and the guilty pleas were by BCCI, who is not a defendant here.

BCCI is a foreign bank with its core operations in Europe, the Middle East, and Africa. At the time it closed in July 1991, BCCI only had two agencies open in the United States. On June 30, 1991, with world-wide deposits reported at $ 15.969 billion, only 1/2 of one percent of those deposits were in BCCI's United States agencies. Not only are 99 1/2 percent of BCCI deposits foreign, none of the deposits made in United States agency offices will be lost.[43]

e. **Extent to which there is explicit purpose to harm or affect American commerce and the foreseeability of such effect.** Plaintiffs contend that BCCI solicited and accepted depositors' money here in the

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[43] Even assuming that United States deposits will be returned to the depositors without any interest for the time the funds were unavailable, that interest constitutes a small percentage of the 1/2 of one percent of the total BCCI deposits made in the United States. More importantly, that lost interest is only a minuscule portion of the deposits lost outside the United States.

United States through its agency offices, despite the fact that it was illegal for BCCI to do so. *See* Complaint, ¶¶ 33, 289(f). However, no justiciable [sic] injury may ever arise from those deposits allegedly made in the United States. Though plaintiffs contend that BCCI's involvement in the United States banking system affects United States commerce, this conduct did not injure plaintiffs. Similarly, the fraud allegedly perpetrated by the accounting firms and H&K in the United States, *see* Complaint, ¶¶ 28, 36, does not reflect an intended effect on United State [sic] commerce because all of plaintiffs' losses stem from their deposit in BCCI's foreign operations.

f. **Relative importance to the violations charged of conduct within the United States as compared with conduct abroad.** Since none of the predicate acts that caused plaintiffs' injuries occurred here, the United States has very little interest in the foreign conduct of BCCI, however egregious it may be. Construing RICO to provide a remedy to this foreign fraud would give RICO a "nearly boundless extraterritorial scope," providing "a vehicle for adventurous civil and criminal litigators with an itch to see the world." *Peters v. Welsh Dev. Agency*, 1991 U.S. Dist. LEXIS 12174 (N.D. Ill. Aug. 29, 1991).

E. FORUM NON CONVENIENS

A party moving to dismiss on grounds of forum non conveniens must show two things: (1) the existence of an adequate alternative forum, and (2) that the balance of private and public interest factors favors dismissal. *Lockman Foundation v. Evangelical Alliance Mission*, 930 F.2d 764, 767 (9th Cir. 1991). The requirement of an adequate

alternative forum is ordinarily satisfied when a defendant is "amenable to process" in the other jurisdiction. *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 254 n.22, 102 S. Ct. 252, 265 n.22, 70 L.Ed.2d 419, 435 n.22 (1981) (citing *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 506-07, 67 S. Ct. 839, 842, 91 L.Ed. 1055, 1061 (1947)).

Here, not all defendants are amenable to process in the United Kingdom. One of BCCI's principal accounting firms (PW/UK), BCCI's public relations firm (H&K), and defendants Naqvi and Iqbal are all subject to U.K. jurisdiction. Defendants BofA, PW/US, and E&Y have stipulated to accede to U.K. jurisdiction. On the other hand, the Clifford Defendants, the InterRedec Defendants, the First American Defendants, and defendant Dobrich contest United Kingdom jurisdiction and are probably not subject to compelled process in the U.K.

The defendants invite the Court to distinguish between "key" defendants – subject to process in the U.K. – and those United States defendants whose conduct did not proximately cause plaintiffs' losses. However, plaintiffs' allegations of conspiracy and aiding and abetting foreclose such a distinction at this time. Thus, assuming *arguendo* that the parties are otherwise properly before the Court, defendants' motion to dismiss on forum non conveniens grounds is denied.

F. MISCELLANEOUS MATTERS

Plaintiffs initially filed their complaint in this action on August 21, 1991; plaintiffs' filed a first amended complaint on September 11, 1991. Leave of Court would therefore be required for plaintiffs to add parties at this

stage of the litigation. *See* Fed. R. Civ. P. 15(a); 21. Having dismissed the Complaint without leave to amend, plaintiffs' motion to add parties is moot.[44]

On a Rule 12(b)(6) motion, it would be premature for the Court to preclusively conclude that no global or worldwide entity theory is available to plaintiffs. *See Department of Econ. Dev. v. Arthur Andersen & Co.*, 683 F. Supp. 1463, 1468 n.1 (S.D.N.Y. 1988) (whether affiliated accounting firms are a single global partnership is a question of fact). The Court's ruling on this issue in the Order was based on the facts as alleged at that time and does not constitute the law of the case. Accordingly, PW/World Firm's motion to strike all references in the Complaint to a "worldwide partnership" with the name "Price Waterhouse," based on the law of the case doctrine, is denied.

As a result of the Court's resolution of the subject matter jurisdiction question, it is unnecessary for the Court to reach the issues of sovereign immunity or personal jurisdiction raised by ADIA's motion to dismiss.

III. CONCLUSION

Though plaintiffs' allegations meet the specificity requirements of federal pleading, plaintiffs' RICO claims

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[44] Consequently, the motion to dismiss brought by Paul C. Warnke, John F. Kovin, David I. Granger, Harold D. Murry, Jr., John G. Calendar, J. Griffin Lesher, Bryan Jay Yolles, Robert P. Reznick, Philip H. Hecht, and James C. Duff is not before this Court.

must be dismissed without leave to amend because plaintiffs clearly allege that no ascertainable structure exists in their RICO enterprises apart from the alleged pattern of racketeering. Additionally, plaintiffs' section 1962(a) RICO claim must be dismissed without leave to amend because no injury from the use or investment of racketeering income exists where only reinvestment is alleged.

Furthermore, plaintiffs are unable to proceed with their claims because they lack standing. Not only are plaintiffs' claims derivative of BCCI and plaintiffs cannot allege any special duty or distinct injury that might avoid this bar to their suit, but plaintiffs fail to allege an injury presently giving rise to their RICO claims because all or part of their claims may be satisfied through liquidation proceedings.

Finally, in light of the foreign conduct that proximately caused plaintiffs' losses and the negligible injuries that might possibly occur to plaintiffs as a result of BCCI's activities in the United States, the Court lacks subject matter jurisdiction under principles of international comity and fairness.

Based on the foregoing, IT IS HEREBY ORDERED that plaintiffs' Complaint is dismissed without leave to amend. The Clerk is ordered to serve a copy of this memorandum opinion on the parties forthwith.

IT IS SO ORDERED.

DATED: 5/20, 1992

/s/
CONSUELO B. MARSHALL
UNITED STATES
DISTRICT JUDGE

(2)

No. 94-1806

Supreme Court, U.S.
FILED
JUN 7 1995
OFFICE OF THE CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1994

SHRICHAND CHAWLA, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

DREW S. DAYS, III
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QUESTION PRESENTED

Whether general creditors of a failed international banking enterprise are entitled to assert a "constructive trust" over the enterprise's United States assets under 18 U.S.C. 1963(*l*), with the effect of preventing criminal forfeiture of those assets.

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In the Supreme Court of the United States

OCTOBER TERM, 1994

No. 94-1806

SHRICHAND CHAWLA, ET AL., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A16) is reported at 46 F.3d 1185. The opinion of the district court (Pet. App. A17-A34) is reported at 833 F. Supp. 9.

JURISDICTION

The judgment of the court of appeals was entered on February 14, 1995. The petition for a writ of certiorari was filed on May 2, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

The four corporate respondents—BCCI Holdings (Luxembourg), S.A.; Bank of Credit and Commerce International, S.A.; Bank of Credit and Commerce International (Overseas) Limited; and International Credit and Investment Company (Overseas) Limited (collectively known as BCCI)—pleaded guilty in the United States District Court for the District of Columbia to an information charging them with violations of the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. 1962. BCCI agreed to criminal forfeiture of virtually all of its assets in the United States. In January 1992, the district court accepted the guilty plea and entered an order of forfeiture under 18 U.S.C. 1963(a). See Pet. App. A2-A4, A18. Petitioners—nine individuals and entities claiming to represent a class of more than 1,000,000 BCCI depositors worldwide—challenged the forfeiture under 18 U.S.C. 1963(*l*)(6)(A), claiming superior title to all or part of the assets to be forfeited. The district court denied petitioners' challenge (Pet. App. A17-A34), and the court of appeals affirmed (*id.* at A1-A16).[1]

1. The 1991 collapse of BCCI, which had operations in some 69 countries, caused courts in Luxembourg and the Cayman Islands to appoint fiduciaries to consolidate BCCI's assets for global distribution to its international creditors and depositors. The

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[1] Petitioners were appellants in the court below. Pet. App. A1. In addition to the four corporate respondents, Raymond Davies, as conservator for BCCI's branch in Sierra Leone, was the appellant in a related case that was consolidated with this case before the court of appeals (see *id.* at A1-A2, A6), and he is therefore a respondent under this Court's Rule 12.4.

forfeiture order in this case provided that half the forfeited assets would be surrendered to the global liquidation fund, while the other half would be reserved to the Attorney General's discretionary allocation for various purposes, including offsetting losses to the FDIC and the American taxpayer. The total amount to be forfeited—some $552 million—was to come largely from United States bank accounts maintained in the name of various BCCI branches overseas. Pet. App. A3-A4.

Section 1963(*l*)(2) of Title 18 allows challenges by third parties "asserting a legal interest in property which has been ordered forfeited to the United States pursuant to" RICO. Section 1963(*l*)(6), in turn, requires the district court to amend the forfeiture order if the claimant establishes that "legal right, title, or interest in the property * * * was vested in the petitioner rather than the defendant," that the claimant's interest "was superior to any right, title, or interest of the defendant at the time of the commission of the acts which gave rise to the forfeiture of the property," or that the claimant "is a bona fide purchaser for value of the right, title, or interest in the property and was at the time of purchase reasonably without cause to believe that the property was subject to forfeiture under this section." 18 U.S.C. 1963(*l*)(6)(A) and (B).

2. Petitioners are nine individuals and entities who claim to represent a class of more than 1,000,000 BCCI depositors. They challenged the forfeiture in this case under 18 U.S.C. 1963(*l*). Pet. App. A5, A19. The same putative class earlier unsuccessfully filed suit in federal court in California against parties who had allegedly contributed to BCCI's collapse. *In re BCCI Depositors Litigation*, No. CV 91-4483 CBM

(MDL-908) (C.D. Cal. May 20, 1992) (order dismissing complaint) (*reprinted at* Pet. App. A35-A72), aff'd *sub nom. Hamid* v. *Price Waterhouse*, 51 F.3d 1411 (9th Cir. 1995).

The district court in this case, after noting that petitioners' shifting characterization of their claims had made it difficult "to understand the nature of the legal right, title, or interest in property" that they alleged (Pet. App. A25), declined to amend the forfeiture order. The court first expressed skepticism regarding petitioners' claim to represent a worldwide class of depositors, explaining that no class was ever certified in the case brought by petitioners and dismissed by the district court in California, and that no motion for class certification was ever filed with the district court in this case. *Id.* at A22. Nonetheless, in view of its conclusion on the merits, the court accepted petitioners' class allegations for purposes of ruling on the government's motion to dismiss. *Id.* at A22-A23. Similarly, the court had doubts that petitioners' written submissions to the court had adequately framed any constructive trust claim. *Id.* at A25-A26. The court agreed, however, to provide petitioners "a generous benefit of the doubt and treat their petitions as if they alleged interests arising both from constructive trusts and from general debtor/creditor relationships." *Id.* at A26.

The district court held (Pet. App. A26-A27) that an equitable interest under a "constructive trust" theory represented a sufficient "legal interest in property which has been ordered forfeited" to support a challenge to the forfeiture order under 18 U.S.C. 1963(*l*)(2). The court nonetheless concluded that it would be "inappropriate to impose a constructive trust in favor of the specific petitioners" in this case.

Pet. App. A27. The court explained that it had approved the BCCI plea agreement in this case in large part because it "provided for the creation of a worldwide victim fund so that 'innocent victims of BCCI's wrongdoing can recover at least a portion of lost assets in as fair a manner as possible—equitable, orderly, and expeditious.'" *Ibid.* (quoting transcript of plea hearing). In the court's view, forfeiture under the plea agreement would allow orderly administration of the global distribution fund, thereby avoiding "piecemeal and unfair distribution." *Ibid.* Thus, the court concluded:

> Assuming as true the petitioners' allegations that all deposits made by the purported class of claimants were fraudulently induced, there can be no doubt that imposition by this Court of a constructive trust on those deposits would cause gargantuan disruption of the global liquidation proceedings currently underway. Besides the practical consideration of this Court's inability to adjudicate whether each of the approximately one million depositors can establish that they made deposits and that such deposits were forfeited by this Court, imposing a trust would significantly harm the abilities of other BCCI creditors to recover fair portions of lost funds. Therefore, * * * a constructive trust in favor of the petitioners will not be imposed.

Id. at A27-A28.

Having refused to impose a constructive trust, the court considered petitioners "simply as general creditors of BCCI." Pet. App. A28. The court explained that "[b]ecause general creditors are unable to assert interests in specific assets, they cannot

assert legal rights, titles, or interests 'in property which has been ordered forfeited' as required by § 1963(*l*)(2)." *Id.* at A29. Petitioners therefore failed to meet the threshold requirement for standing to challenge the forfeiture. In addition, the court indicated that it would have rejected petitioners' claim on the merits, because "they could not, as general unsecured creditors, be considered to have the 'vested' or 'superior' rights, titles, or interests in forfeited property which are required by § 1963(*l*)(6)(A)." *Id.* at A30. Finally, the court noted that if it had been willing to impose a constructive trust, it "appear[ed]" that petitioners might have been able to recover on the merits, "but only if they could trace their interests to specific funds before the Court." *Id.* at A30 n.6.

3. The court of appeals affirmed. Pet. App. A1-A16. The court agreed that petitioners' constructive trust claim asserted a "legal" interest in property for purposes of 18 U.S.C. 1963(*l*), even though the claim was equitable in nature. Pet. App. A8-A11. The court thought it unclear whether, in drafting Section 1963(*l*), Congress used the terms "legal" and "equitable" in their technical or more general senses, but it ultimately refused to recognize any "distinction between technically legal and technically equitable claims in forfeiture challenges." Pet. App. A10. Nonetheless, the court concluded that "a constructive trust may not be used to defeat the government's forfeiture claim." *Id.* at A11.

Noting that "[t]he key words in section 1963(*l*)(6)(A) to identify statutorily cognizable third party interests are 'vested,' 'superior,' and 'at the time,'" the court interpreted the statute to require a claimant to "establish that his interest had vested or

was superior to the defendant's interest *'at the time of the commission of the acts which gave rise to the forfeiture.'*" Pet. App. A11 (quoting 18 U.S.C. 1963(*l*)(6)(A)). The court explained that a constructive trust is "a fictional trust—not a real one," and represents "a *remedy* that a court devises after litigation." Pet. App. A12. Thus, such a trust "could not have been shown to exist at the time the [forfeiture defendant's] acts were committed." *Ibid.*

The court also reasoned that another provision of RICO provides that "title in all criminally acquired property of the defendant is deemed to 'vest[] in the United States upon the commission of the act giving rise to forfeiture.'" Pet. App. A12 (quoting 18 U.S.C. 1963(c)). Because the statute itself "creates a retroactive legal fiction similar to a constructive trust for the benefit of the United States," the court held, "[i]t is not open to a court to fashion another remedy (a competing fiction) that also reaches back to snatch the property away from the United States—which is exactly what a constructive trust would do." Pet. App. A12. Accordingly, the court of appeals "disagree[d] with those courts that have determined that a constructive trust can be interposed as superior to the government's forfeiture claim," because those courts "did not consider whether a judicially imposed constructive trust would be inconsistent with the statutory remedial scheme." *Ibid.*[2]

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[2] Both the district court (Pet. App. A30-A32) and the court of appeals (*id.* at A13-A16) also rejected petitioners' alternative argument that they should be treated as "bona fide purchasers" for purposes of 18 U.S.C. 1963(*l*)(6)(B). Petitioners do not renew that claim in this Court.

ARGUMENT

Petitioners contend (Pet. 13-28) that they are entitled to assert a constructive trust over certain forfeited assets of BCCI, and that their interest is superior to the government's interest in those assets. The court of appeals correctly rejected that claim, and the matter does not warrant further review.

1. We note, at the outset, that petitioners have neither requested nor obtained certification as representatives of the class of worldwide BCCI depositors that they purport to represent. See Pet. App. A22. Moreover, petitioners waived their right to assert the "constructive trust" theory on which the courts below ruled, and on which they now seek to proceed, by failing to raise it in a timely manner or to comply with the notice requirements of 18 U.S.C. 1963(*l*)(3). See Pet. App. A25-A26. Despite the court of appeals' statement to the contrary (*id.* at A8), the government did urge that court to reject petitioners' "constructive trust" claims solely on the basis of petitioners' procedural default. See, *e.g.*, Gov't C.A. Br. 35-36 (despite "ample reasons" to sustain the district court's decision on the merits, "the government asks that this Court rule as a procedural matter that [the] Class Petitioners waived their opportunity to assert an interest as beneficiaries of a constructive trust by failing to comply with the requirements of § 1963(*l*)(3)"). Under the circumstances, neither court below should have considered the merits of the claim that petitioners seek to raise here. That procedural default is also a sufficient basis for the denial of review by this Court.

2. Congress enacted 18 U.S.C. 1963(*l*) in order to allow third parties an opportunity to challenge

criminal forfeiture orders on the ground that some or all of the property to be forfeited in fact belonged to them, rather than to the defendant. See *United States* v. *Schwimmer*, 968 F.2d 1570, 1580 (2d Cir. 1992). A third party challenging the validity of a criminal forfeiture must therefore assert, as a threshold matter, "a legal interest in property which has been ordered forfeited." 18 U.S.C. 1963(*l*)(2). To prevail on its claim, the third party must then demonstrate that the "legal right, title, or interest in the property * * * was vested in the petitioner rather than the defendant," or that the claimant's legal interest "was superior to any right, title, or interest of the defendant at the time of the commission of the acts which gave rise to the forfeiture of the property." 18 U.S.C. 1963(*l*)(6)(A). A party that cannot demonstrate such a superior legal interest may appeal to the Attorney General, who may "grant petitions for mitigation or remission of forfeiture, restore forfeited property to victims * * *, or take any other action which is in the interest of justice and which is not inconsistent with" RICO's other provisions. 18 U.S.C. 1963(g)(1).

Petitioners' claim depends on the imposition of a "constructive trust" on their deposits, which petitioners contend BCCI procured by fraud. See, *e.g.*, Pet. 23-24. The term "constructive trust" describes an equitable remedy, not a basis for asserting legal title. See, *e.g.*, Pet. App. A8-A9 (citing *Healy* v. *Commissioner*, 345 U.S. 278, 282 (1953)), A12; Pet. 23-24. As the government argued in the court below (see Pet. App. A8-A10), RICO's provisions are properly read to limit forfeiture challenges under Section 1963(*l*) to legal claims, while remitting equitable claims to the Attorney General's discretion to act "in

the interest of justice" (18 U.S.C. 1963(g)(1)). While the court of appeals incorrectly rejected that argument (Pet. App. A8-A11), it went on correctly to reject petitioners' request for equitable relief.

The court of appeals focused on the requirement that a claimant's right to the property at issue must be "vested" or "superior" to the defendant's "at the time of the commission of the acts which gave rise to the forfeiture." Pet. App. A11 (quoting 18 U.S.C. 1963(*l*)(6)(A)). As the court pointed out (Pet. App. A12), "[a] constructive trust is a *remedy* that a court devises after litigation." Even when that remedy is a permissible one, the decision to grant or withhold it under particular circumstances is a matter for the sound discretion of the district court. See, *e.g.*, *Downriver Community Federal Credit Union* v. *Penn Square Bank*, 879 F.2d 754, 758 (10th Cir. 1989), cert. denied, 493 U.S. 1070 (1990). Thus, it is impossible to know whether a constructive trust covering certain property "exists" until after the completion of litigation. The court of appeals therefore correctly held that, for purposes of Section 1963(*l*), the equitable interest on which petitioners rely "could not have been shown to exist at the time [BCCI's illegal] acts were committed." Pet. App. A12.

Petitioners argue (Pet. 25-26) that a constructive trust arises immediately upon the commission of whatever wrongful act might ultimately persuade a court to impose one. It is true that once such a trust has been declared, the law assumes that the property in question was held "in trust" from the moment it was wrongfully acquired. In the context of applying Section 1963(*l*), however, petitioners' theory ignores the wide discretion normally accorded district courts in fashioning remedies. If a court decides in a par-

ticular case, as the district court did here (see Pet. App. A27-A28), that it would be inequitable, under all the circumstances, to impose a constructive trust, then an interest of the type alleged by petitioners never arises. Because "all the circumstances" relevant to that remedial decision cannot be known before the time the decision is made, such an interest cannot be "vested," or "superior" to the defendant's legal title, before that time.

As the court of appeals explained, that conclusion is strengthened in the context of Section 1963(*l*) by the fact that RICO includes its own relation-back doctrine in Section 1963(c), which provides that title to all property subject to forfeiture under the Act "vests in the United States upon the commission of the act giving rise to forfeiture." Because imposition of a constructive trust would be in tension with that statutory scheme, the court was correct to hold that it should not "fashion another remedy (a competing fiction) that also reaches back to snatch the property away from the United States." Pet. App. A12; compare *In re Omegas Group, Inc.*, 16 F.3d 1443, 1448-1453 (6th Cir. 1994) (constructive trust may not be used to vest unsecured creditor with rights greater than those provided for under federal bankruptcy law); *Downriver Community Federal Credit Union* v. *Penn Square Bank*, 879 F.2d at 758 (constructive trust may not be used to give uninsured bank depositors greater rights than otherwise available under federal banking law).

3. Petitioners suggest (Pet. 27-28) that the court of appeals' reliance on Section 1963(c) conflicts with this Court's decision in *United States* v. *92 Buena Vista Avenue*, 113 S. Ct. 1126 (1993). That is incorrect. *92 Buena Vista Avenue* held that 21 U.S.C. 881(h),

which uses essentially the same words as 18 U.S.C. 1963(c), could not operate to relate the government's title to property back to the time of a defendant's criminal acts until the government first secured a judgment of forfeiture. 113 S. Ct. at 1136-1137 (plurality opinion); *id.* at 1141 (Scalia, J., concurring in the judgment). In this case, the government had secured such an order of forfeiture, see Pet. App. A18, which petitioners were seeking to "amend" by invoking their own, equitable relation-back doctrine. 18 U.S.C. 1963(*l*)(6). *Buena Vista* dealt with the rights of alleged innocent owners whose property interests existed at the time of the event giving rise to the forfeiture. Nothing in *Buena Vista* suggests that a claimant may seek to establish, via "a competing [legal] fiction" (Pet. App. A12), a retroactive property interest that trumps the right vested in the government by the order of forfeiture. Indeed, *Buena Vista* indicates that the retroactive vesting of property interests cannot occur until the court renders a judgment accepting the relevant claim. That proposition supports the conclusion that petitioners' alleged interest, which was never recognized by a judicial declaration of a "constructive trust," did not exist "at the time of the commission of the acts which gave rise to the forfeiture." 18 U.S.C. 1963(*l*)(6)(A).

4. Petitioners contend (Pet. 11 & n.6, 13) that the decision below conflicts with decisions of five other courts of appeals. It is not clear, however, that any other court would have reached a different result on the facts of this case.

Three of the cases that petitioners cite did not address the constructive trust issue at all, or did so only in passing dicta. In *United States* v. *Reckmeyer*, 836 F.2d 200, 205-209 (1987), the Fourth Circuit held

only that an unsecured creditor might in certain circumstances qualify as a "bona fide purchaser for value" under 21 U.S.C. 853(n)(6)(B), a provision parallel to 18 U.S.C. 1963(*l*)(6)(B). Petitioners do not rely on Section 1963(*l*)(6)(B) in this Court. See note 2, *supra*. Similarly, in *United States* v. *Lavin*, 942 F.2d 177, 187 n. & 12 (1991), the Third Circuit held only that an embezzlement victim could not assert a valid claim as a "bona fide purchaser" (under 21 U.S.C. 853(n)(6)(B)) after a forfeiture order was entered against the property of the embezzler (who was also a drug dealer). The claimant in *Lavin* specifically conceded that its interest did not relate back to the time of the acts giving rise to the forfeiture, and the case therefore involved none of the questions that petitioners seek to present here. See *Lavin*, 942 F.2d at 185-187 & n.12. And in *United States* v. *Campos*, 859 F.2d 1233, 1238-1239 (1988), the Sixth Circuit held that the unsecured trade creditors before it could not show the threshold "legal right, title, or interest in the [forfeited] property" necessary to state a claim under 21 U.S.C. 853(n)(6), and merely noted that the requisite "superior" interest could only be "one in the nature of a lien, mortgage, recorded security device, constructive trust, valid assignment, or the like." That suggestion does not demonstrate that the *Campos* court would have reached a decision different from that of the court below on the facts of this case.

Only two of the cases petitioners cite actually addressed the constructive trust issue, and neither decision conflicts with the decision below. In *United States* v. *Marx*, 844 F.2d 1303, 1306-1308 (7th Cir. 1988), the claimant asserted that specific shares of stock otherwise subject to forfeiture (under 21 U.S.C. 853) were held in the defendant's name subject to an

express trust arrangement. The Seventh Circuit recognized the express trust, and its references to a "constructive trust" referred to the appropriate remedy for the trustee-defendant's breach of the beneficiary-claimant's rights under that trust. *Marx*, 844 F.2d at 1307. Notably, the court of appeals in this case referred to such a breach of an express trust obligation as an illustration of the type of equitable interest that it believed Section 1963(*l*) would reach. Pet. App. A11. At the same time, the *Marx* court did not consider a constructive trust claim based on a fraud on general creditors who lacked any specific interest in the particular property forfeited. The two cases therefore involved different settings, and their conclusions are compatible with one another.

Finally, petitioners cite *United States* v. *Schwimmer*, *supra*. *Schwimmer* did hold (968 F.2d at 1582) that "constructive trust" interests could under some circumstances satisfy the "legal interest" requirement of Section 1963(*l*)(2). On the facts before it, however, the court actually reversed a decision amending a forfeiture order, holding that "a constructive trust warrants an amendment of an order of forfeiture only if the District Court finds that the property ordered forfeited is traceable to property held in constructive trust." 968 F.2d at 1574. The court stressed that amendment would be warranted only where the claimant asserted a "genuine property interest" (*id.* at 1584)—that is, an interest in specific assets "held in constructive trust or traceable to such assets" (*id.* at 1583). *Schwimmer* rejected the "relaxed tracing standard" urged by the claimants, explaining that, "[b]ecause Congress has chosen to allocate to the Attorney General the power to remit funds for victim compensation, it is inappropriate

in the context of this case to relax conceptions of property rights in order to permit courts to compensate victims." *Id.* at 1584. The *Schwimmer* court's objection to the recognition of claims to untraced assets would apply with equal force to the facts of this case.

Indeed, in declining to recognize a constructive trust in this case, the district court relied in part on the difficulty that it would inevitably have encountered in attempting to evaluate whether petitioners' claims could be adequately traced to those BCCI assets subject to the court's jurisdiction. Pet. App. A28 (noting "the practical consideration of this Court's inability to adjudicate whether each of the approximately one million depositors can establish that they made deposits and that such deposits were forfeited by this Court"); *id.* at A30 n.6 (citing *Schwimmer* for the proposition that a constructive trust would assist petitioners "only if they could trace their interests to specific funds before the Court"). The court also relied on its assessment that imposition of a constructive trust in favor of petitioners would disrupt the "equitable, orderly, and expeditious" conduct of the global BCCI liquidation proceedings (of which the plea agreement in this case forms a part), and would "significantly harm the abilities of other BCCI creditors to recover fair portions of lost funds." *Id.* at A27-A28. The district court's refusal to impose a constructive trust on the facts of this case was plainly a reasonable exercise of its equitable discretion, and its reasons are consonant with those discussed in *Schwimmer*. There is accordingly no reason to believe that the outcome of this case would have been different in the Second Circuit.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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In The

Supreme Court of the United States

October Term, 1994

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vs.

UNITED STATES OF AMERICA,

Respondent.

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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S. Ct. Rule 15.6..... 1

No. 94-1806

In The

Supreme Court of the United States

October Term, 1994

SHRICHAND CHAWLA, LEO D. CURRAN, WILLY HERMANS, RED CIRCLE INVESTMENT, LTD., JALEH KHORASSANCHY, AMIT PANDYA, SOHA, INC., IDRISS DEVCO, INC., and S&L GENTRADE, INC.,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Petitioners, by counsel and pursuant to S. Ct. Rule 15.6, hereby file their Reply Brief to the Oppositions to the Petition for Writ of Certiorari filed by the United States Government and the Court Appointed Fiduciaries of BCCI.[1]

[1] Page references to the Petition for Writ of Certiorari, which was filed on May 2, 1995, are stated herein as "Pet. at ___" while references to the appendices thereto are stated herein as "A-___." Page references to the Brief for the United States in Opposition are stated herein as "Gov't Opp. at ___" while references to the Brief for the Court Appointed Fiduciaries of BCCI in Opposition are stated herein as "Fid. Opp. at ___." While those Oppositions were filed in this Court on June 7, 1995, they were not served on counsel of record for Petitioners until June 12, 1995.

1. Petitioners Have Standing To Challenge The RICO Forfeiture Order

Challenges to Petitioners' standing raised by the Government and the Fiduciaries are without merit. *See* Gov't Opp. at 2; Fid. Opp. at 14. In accordance with Section 1963(*l*) of RICO, in the courts below Petitioners properly asserted a "legal right, title, or interest" in BCCI's multi-million dollar forfeited assets by alleging a constructive trust or equitable lien over the billions of dollars which they were defrauded into depositing into the BCCI Banks years before BCCI's commission of the pattern of racketeering activity which led to its 1992 RICO guilty plea and the resulting forfeiture order. *See* Pet. at 8-9.

To show standing, a litigant must allege a "distinct and palpable injury to himself," *Warth v. Seldin*, 422 U.S. 490, 501 (1975), fairly traceable to the "putatively illegal conduct of the defendant," *Gladstone Realtors v. Village of Bellwood*, 441 U.S. 91, 99 (1979), and likely to be redressed by the requested relief, *Simon v. Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26, 44-45 (1976). *See also Association of Data Processing Service Organizations, Inc. v. Camp*, 397 U.S. 150, 153 (1970) (standing inquiry is also informed by "whether the interest sought to be protected by the complainant is arguably within the zone of interests sought to be protected or regulated by the statute or constitutional guarantee in question"). The Government and the Fiduciaries ignore the fact that the legislative history underlying the 1984 amendments to Section 1963(*l*) of RICO indicates that an expansive "zone of interests" is protected by allowing innocent third parties such as Petitioners to challenge forfeiture orders, *see* Pet. at 16-19, as the District of Columbia Circuit conceded in this case, *see* A-10 to A-11. As the First Circuit has said, commenting on standing in a forfeiture action, "[a]t this preliminary juncture . . . the claimant need not prove the full merits of her underlying claim. All that needs to be shown is a 'facially colorable interest in the proceedings

sufficient to satisfy the case-or-controversy requirement' and 'prudential considerations defining and limiting the role of the court.' " *United States v. 116 Emerson Street*, 942 F.2d 74, 78 (1st Cir. 1991) (citations omitted).

Petitioners have more than satisfied the applicable standard in this case[2] because they clearly assert a "distinct and palpable injury," *Warth*, 422 U.S. at 501 – the loss of hundreds of millions of dollars worth of illegally-obtained deposits through an allegedly unlawful RICO forfeiture – that is the direct result of "putatively illegal" governmental action, *Gladstone Realtors*, 441 U.S. at 99, and their injury would be redressed by a successful challenge to the district court's forfeiture order, *Simon*, 426 U.S. at 44-45. Further, with respect to the "zone of interests," *Data Processing*, 397 U.S. at 153, Petitioners have alleged (and made a prima facie showing) that they possess the beneficial ownership of a constructive trust or equitable lien over their deposits in the BCCI Banks. *See Torres v. $36,256.80 U.S. Currency*, 25 F.3d 1154, 1158 (2d Cir. 1994). Therefore, the challenges to Petitioners' standing raised by the Government and the Fiduciaries should be overruled.

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[2] The Fiduciaries argue that the Petition should be denied, contending that the record in this case has not been sufficiently developed to allow "[t]houghtful [c]onsideration" of the important issues presented by Petitioners, Fid. Opp. at 15, conveniently ignoring the fact that the district court, at the urging of the Fiduciaries and the Government, improperly denied Petitioners their statutorily-mandated right to an evidentiary hearing to contest the forfeiture order. *See* Pet. at 17-19; 18 U.S.C. § 1963(*l*)(5) ("At the hearing, the petitioner may testify and present evidence and witnesses on his own behalf, and cross-examine witnesses who appear at the hearing. . . . ").

2. The Constructive Trust Or Equitable Lien Asserted By Petitioners Constitutes A Legal Right, Title, Or Interest In BCCI's Forfeited Property

Contrary to the Government's assertion, *see* Gov't Opp. at 8-10, the District of Columbia Circuit squarely held that the constructive trust or equitable lien asserted by Petitioners constitutes a "*legal* right, title, or interest" in BCCI's forfeited property, 18 U.S.C. §1963(*l*)(6)(A) (emphasis added), and it *rejected* the arguments which the Government seeks to resurrect in this Court. *Compare* Gov't Opp. at 8 (asserting that Petitioners "waived" their right to assert a constructive trust over BCCI's forfeited property) *with* A-8 ("[S]ince the government does not actually challenge the district court's ruling [permitting the defrauded depositors to assert a constructive trust theory], we do not understand why the government even raises the matter before us"); *compare* Gov't Opp. at 9-10 (asserting that a constructive trust is an "equitable" remedy, not a legal right, title, or interest under Section 1963(*l*)(A) of RICO) *with* A-10 ("[W]e agree with our sister circuits that have rejected the notion that Congress intended to draw the ancient, but largely ignored, distinction between technically legal and technically equitable claims in forfeiture challenges.") (citations omitted). Moreover, the Government continues to ignore the fact that *every* circuit and district court to address the issue has held that a constructive trust or equitable lien constitutes a legal right, title, or interest under Section 1963(*l*)(6)(A) of RICO. *Compare* Pet. at 11 n.6 (collecting cases) *with* Gov't Opp. at 8-10 (ignoring cases). *See also United States v. Coluccio*, 51 F.3d 337, ___ (2d Cir. 1995) (holding that a claimant who asserted a constructive trust over $2,500 used to secure a cost bond had standing to contest forfeiture of the bond under 21 U.S.C. §881 because the Government's forfeiture "would result in unjust enrichment of the Government and commensurate unjust impoverishment of the claimant if Ms. Coluccio were denied standing") (citing *Torres*, 25 F.3d at 1159).

3. The Legal Right, Title, Or Interest Was Vested In Petitioners Rather Than BCCI

Under Section 1963(*l*) of RICO, Petitioners asserted in the courts below that their legal right, title, or interest in the forfeited property rendered the forfeiture order invalid "because the right, title, or interest was vested in the [P]etitioner[s] rather than [BCCI]." 18 U.S.C. §1963(*l*)(6)(A). Both the Government and the Fiduciaries inexplicably ignore the plethora of cases and secondary authorities squarely holding that because their multi-billion dollar deposits were induced by fraud, Petitioners retained title to their money, *which never passed to the BCCI Banks* and, thus, BCCI never had property interests in the stolen money which could be forfeited to the Government under RICO. *Compare* Pet. at 22 & n.18 *with* Gov't Opp. at 10-11 *and* Fid. Opp. at 7, 15-16; *see also United States v. Lavin*, 942 F.2d 177, 185 (3d Cir. 1991); *County of Oakland v. Vista Disposal*, 875 F.2d 410 (E.D. Mich. 1995).[3] Therefore, title to the forfeited property was *vested* in Petitioners, rather than BCCI, and by forfeiture the Government can succeed to no greater title than that held by the criminal defendant. *See* Pet. at 19-20.

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[3] Unfairly accusing Petitioners of seeking to jump the queue of BCCI's other creditors in priority, *see* Fid. Opp. at 7, the Fiduciaries (and the Government) ignore the fact that it is the Government which improperly seeks to advance its distribution priority by this forfeiture proceeding, *see* Pet. at 13 & n.7, and that under these circumstances – where Petitioners allege that they were defrauded into making their deposits into an insolvent bank – they are *entitled to priority* over the general creditors of the BCCI Banks, *id.* at 24 n.20; *see also St. Louis & S.F. Ry. v. Johnston*, 133 U.S. 566, 576-77 (1890); *Carnegie-Illinois Steel Corp. v. Berger*, 105 F.2d 485, 487 (3d Cir.), *cert. denied*, 308 U.S. 603 (1939); *Standard Oil Co. v. Elliott*, 80 F.2d 158, 161 (4th Cir. 1935); *Federal Reserve Bank v. Omaha Nat'l Bank*, 45 F.2d 511, 519 (8th Cir. 1930), *cert. denied*, 282 U.S. 902 (1931).

4. Petitioner's Interest In The Forfeited Property Is Superior To BCCI's Non-Existent Interest

In the courts below, Petitioners correctly (and consistently) asserted that their constructive trust or equitable lien over BCCI's forfeited property "was superior to any right, title, or interest of [BCCI] at the time of the commission of the acts which gave rise to" the forfeiture order. 18 U.S.C. §1963(*l*)(6)(A). Neither the Government nor the Fiduciaries can dispute the fact that Petitioners' constructive trust or equitable lien over that forfeited property arose when their deposits were made years before BCCI committed the predicate acts which led to its 1992 RICO guilty plea and the forfeiture order at issue. *Compare* Pet. at 25 *with* Gov't Opp. at 10. Contrary to the Government's assertion, *see* Gov't Opp. at 10-11, which is parroted by the Fiduciaries, *see* Fid. Opp. at 16-17, RICO's express statutory language gives the district court no discretion as to whether or not it will recognize Petitioners' legal right, title, or interest; indeed, neither the Government nor the Fiduciaries cite any cases to support the unique proposition which they now advance.

Moreover, neither the Government nor the Fiduciaries make any attempt to distinguish numerous forfeiture cases – including this Court's venerable decision in *United States v. Stowell*, 133 U.S. 1, 19 (1890) – clearly holding that (1) Petitioners' constructive trust or equitable lien arose at the time they were fraudulently induced to deposit their money into the insolvent BCCI Banks; (2) Petitioners' constructive trust or equitable lien, if proven at the statutorily-mandated evidentiary hearing, is superior to any possessory interest held by BCCI; and (3) the Government, through forfeiture, simply steps into BCCI's shoes and its interest is, therefore, subordinate to Petitioners' right, title, or interest. *See* Pet. at 25-28 (collecting cases and secondary authorities); *see also Lavin*, 942 F.2d at 185; *In re Metmor Fin., Inc.*, 819 F.2d 446, 448-49 (4th Cir. 1987); *County of Oakland v. Vista Disposal*, 840 F. Supp. 73, 77 (E.D. Mich. 1993); *United States v. 1419 Mount Alto*

Road, 830 F. Supp. 1476, 1481-82 (N.D. Ga. 1993). Contrary to the Government's and the Fiduciaries' submissions, *see* Gov't Opp. at 12-15; Fid. Opp. at 10-13, the District of Columbia Court of Appeals flatly refused to follow decisions from the Second, Third, Fourth, Sixth and Seventh Circuits holding that a constructive trust (or equitable lien) can be interposed as *superior* to the Government's forfeiture claim under Section 1963(*l*)(6)(A), or equivalent criminal forfeiture statutes, *see* A-12, thereby creating a *split* in the circuits which only this Court can resolve.

5. Application Of The Relation-Back Doctrine Does Not Save The Illegal Forfeiture Order

Improperly seeking to trump Petitioners' constructive trust or equitable lien over BCCI's forfeited property, the Government relies on the so-called "relation-back doctrine," once again ignoring the fact that Petitioners were defrauded into depositing their money into the BCCI Banks years before BCCI used their money to commit the predicate acts which resulted in the 1992 guilty plea and resulting RICO forfeiture order. *Compare* Pet. at 20-21, 28 *with* Gov't Opp. at 11-12. As the Government must concede, *see* Gov't Opp. at 12, this Court's decision in *United States v. 92 Buena Vista Avenue*, ___ U.S. ___, 113 S. Ct. 1126, 1136-37 (1993) (plurality opinion), limits the sweep of the relation-back doctrine to protect the rights of innocent owners whose property interests existed at the time of the criminal acts giving rise to the forfeiture. The Government ignores the fact that subsequent decisions construing and applying *92 Buena Vista Avenue* clearly support Petitioners' position here. For example, in *Counihan v. Allstate Insurance Co.*, 25 F.3d 109 (2d Cir. 1994), the Second Circuit held that the relation-back provision of the drug offense forfeiture statute, 21 U.S.C. §881(h) – which is virtually identical to RICO's relation-back provision, 18 U.S.C. §1963(c) – could not divest a property owner of an insurable interest so as to bar recovery on a fire insurance policy where the fire loss

occurred before the government acquired title to the property pursuant to a final decree of forfeiture. Recognizing that the insured's rights under a fire insurance policy are fixed both as to the amount and standing to recover at the time of the fire loss, *id.* at 111 – just as Petitioners' constructive trust or equitable lien arose when they were fraudulently induced to deposit their money into the BCCI Banks, *see* Pet. at 25-27 – the Second Circuit relied on this Court's decision in *92 Buena Vista Avenue*, 113 S. Ct. at 1137, to support its holding protecting the innocent property owner's rights:

> The foregoing compels the conclusion that not every right of the owner is lost by virtue of the relation-back of title. Among the rights that survive are rights under a fire insurance policy which, as previously noted, "are fixed both as to amount and standing to recover at the time of the fire loss." Here, the government did not win a final judgment of forfeiture until long after the loss by fire of the property in which plaintiff clearly had an insurable interest. By the time that judgment was entered, the right of plaintiff to assert a claim under her insurance policy had become fixed. Simply put, the government could not contend that it owned the property until a judgment of forfeiture was entered. By then, Allstate's obligation to pay had become fixed under plaintiff's policy and that obligation could not be discharged by the operation of the legal fiction known as relation-back.

25 F.3d at 113 (citations omitted). *Accord United States v. Real Property Located at 41741 National Trails Way*, 989 F.2d 1089, 1091-92 (9th Cir. 1993) (government's retroactive title does not defeat attorney's lien for fees incurred in defending against forfeiture); *United States v. Moffitt*, 875 F. Supp. 1190 (E.D. Va. 1995).

These cases clearly support Petitioners' assertion that their constructive trust or equitable lien was in existence "at the time of the commission of the [predicate] acts which gave rise to the forfeiture" of BCCI's property, 18

U.S.C. §1963(*l*)(6)(A), and, under this Court's decision in *92 Buena Vista Avenue*, the RICO forfeiture order and the relation-back doctrine cannot be used by the Government to divest Petitioners of their right, title, or interest.

6. Public Policy Grounds Do Not Support Denial Of The Petition

Finally, both the Government and the Fiduciaries contend that the Petition should be denied because, in their view, allowing Petitioners to challenge the RICO forfeiture order would interfere with BCCI's liquidation proceedings in Luxembourg. *See* Gov't Opp. at 15; Fid. Opp. at 16-19. There are no facts supporting the Fiduciaries' statement that this Court's review of the illegal RICO forfeiture entered in this case would "significantly delay compensation to the depositors and other creditors of BCCI," Fid. Opp. at 16; indeed, the Fiduciaries neglect to inform this Court that BCCI's liquidation proceeding, which has been pending in Luxembourg for over three years, has yet to pay a single penny, pound, or franc to *any* depositor, but the Fiduciaries (and their professional advisors) have nevertheless collected millions of dollars in fees.

Contrary to the position taken by the Fiduciaries, permitting the defrauded depositors represented by Petitioners to assert their rights to BCCI's forfeited property under Section 1963(*l*) of RICO will not cause a "tremendous disruption" in the ongoing liquidation proceedings. Fid. Opp. at 18. Contrary to the situation presented in *Downriver Community Fed. Credit Union v. Penn Square Bank*, 879 F.2d 754, 763 (10th Cir. 1989), *cert. denied*, 493 U.S. 1070 (1990), upon which the Fiduciaries place great reliance, *see* Fid. Opp. at 17-19, permitting Petitioners to challenge the RICO forfeiture order in this case will not result in unequal treatment of the hundreds of thousands of defrauded depositors in the BCCI Banks because Petitioners seek to represent all of them. Moreover, contrary to their assertion before this Court, the Fiduciaries do not

have the sole right to act on behalf of all BCCI depositors, each of whom are the beneficiaries of the constructive trust or equitable lien which Petitioners asserted in the courts below. *Cf. Hayes v. Gross*, 982 F.2d 104, 108-09 (3d Cir. 1992).

7. Conclusion

For the reasons stated herein, as well as in the Petition for Writ of Certiorari, review of the RICO forfeiture order and the proceedings in the courts below by this Court is essential to secure justice and compensation for the hundreds of thousands of defrauded BCCI depositors.

DATED: June 15, 1995

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UNITED STATES OF AMERICA

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---

BRIEF FOR THE COURT APPOINTED FIDUCIARIES OF BCCI IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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PARTIES TO THE PROCEEDINGS

In addition to the parties set forth in the petition for writ of certiorari, BCCI Holdings (Luxembourg) SA, Bank of Credit and Commerce International SA, Bank of Credit and Commerce International (Overseas) Limited, and International Credit and Investment Company (Overseas) Limited, through their Court Appointed Fiduciaries, who were Defendants-Appellees in the court below are Respondents in this proceeding.*

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* Pursuant to Rule 29.1, the following are subsidiaries of BCCI Holdings (Luxembourg) SA not wholly owned: Italfinance International SpA; BCCI (Nigeria) Ltd.; BCCI (Swaziland) Ltd.; BCC Zimbabwe Ltd.; BCC Cameroon SA; BCC (Emirates); BCC (Misr) SAE; BCC Hong Kong Ltd.; BCCI Finance International Ltd.; Banco de Credito e Comercio de Investmento SA; BCC SAE; National Bank of Oman Ltd. (SAO); BCC Ghana Ltd.; BCC SA; PT BCC Pratama Leasing Indonesia; BCCI Leasing (Malaysia) Sdn. Bhd.; Kuwait International Finance Company SAK; Banque de Commerce et de Placements S.A.

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BCCI Holdings (Luxembourg) SA, Bank of Credit and Commerce International SA, Bank of Credit and Commerce International (Overseas) Limited, and International Credit and Investment Company (Overseas) Limited (collectively "BCCI"), through their Court Appointed Fiduciaries, oppose the petition for a writ of certiorari. Petitioners assert that a writ should issue to resolve a clear conflict among the circuits on the treatment of third parties in forfeiture actions. In fact, there is no genuine conflict among the circuits on the narrow issue presented here—whether a constructive trust can constitute a legal interest superior to the government's forfeiture rights. Accordingly, review by this Court is unnecessary, and, in all events, this case would be a

wholly inappropriate vehicle for resolving the issue that Petitioners seek to frame.

The circuit court below acknowledged the general proposition that a constructive trust, in some circumstances, may be imposed for the benefit of depositors who deposit their funds in a banking institution ignorant that the institution is insolvent or corrupt. But the court ruled that such a trust is, as its name implies, "constructive." It is imposed as an equitable remedy, at the time of litigation, and hence cannot defeat the government's forfeiture interest which attaches at the time of the underlying criminal activity. While other circuits have suggested (and in one case held) that a constructive trust can in certain circumstances take precedence over the government's forfeiture rights, in none of those few cases has a lower court analyzed the effect of the relation-back doctrine, which the court below found determinative. Thus, while the lower courts have reached differing results, the legal principles underlying their decisions are not genuinely in conflict. The narrow issue addressed by the court below has yet to be explored by the other courts of appeals, and its consideration by the Court in this case would be premature.

Moreover, consideration of that narrow issue in the overall context of this case would be especially unwarranted. First, this case does not present the broad issue of how innocent depositors should be treated in the context of a forfeiture of a bank's assets. Rather, it presents the much narrower question of *who* should represent the interests of such depositors in this multinational insolvency. Petitioners' invocation of the constructive trust doctrine is calculated to usurp the role of the Court Appointed Fiducaries as the judicially authorized representatives of the worldwide depositors and creditors of BCCI, and to turn this forfeiture action into a separate liquidation of BCCI's U.S. assets in direct conflict with the official liquidation proceedings currently in progress.

This Court's consideration of the interplay between constructive trust and forfeiture would therefore be complicated by the preliminary issue of whether these Petitioners are the appropriate parties to assert these claims in derogation of the rights of the Court Appointed Fiduciaries. Second, Petitioners raised their assertion of a constructive trust reaching all of BCCI's forfeited U.S. assets only as an afterthought in the district court. Not only would this Court be left to consider the issue in the absence of genuine development by the various courts of appeals, it would have to do so in the absence of a meaningful record even in the instant case. Third, even were the Court to rule that a constructive trust could, as an abstract legal matter, take precedence over the government's forfeiture rights, given the decision of the district court, such a ruling would have no practical impact on the result in this case, but would have a substantial adverse impact on the rights of worldwide victims of BCCI. Unlike the court of appeals, the district court held that a constructive trust may take priority over a forfeiture where equitable considerations (on which the constructive trust doctrine turns) favor its imposition. But the district court has already ruled, in the exercise of its sound discretion, that the equities simply do not support imposition of such a trust in the instant case. A remand with directions that the doctrine can supply a basis for a legal interest superior to the government's is likely to yield the same outcome, albeit with the significant delay of any distribution to victims that prolonging this litigation would inescapably entail.

STATEMENT OF THE CASE

Because the unique facts and procedural history of this case make clear why it is an inappropriate vehicle for resolving general issues of forfeiture law, the Court Appointed Fiduciaries expand upon the recitation set forth by the court below.

A. The Collapse of BCCI and the Appointment of the Court Appointed Fiduciaries

On July 5, 1991, bank regulators in Luxembourg, the Cayman Islands, the United Kingdom, the United States and elsewhere, in a coordinated effort, seized and shut down BCCI. Appendix to Petition for Writ of Certiorari ("Pet. App.") A-2. Following these seizures, judicial authorities in the Cayman Islands, where BCCI Overseas and ICIC Overseas are incorporated, in Luxembourg, where BCCI Holdings and BCCI SA are incorporated, and in the United Kingdom, where BCCI SA had its major banking operations, appointed fiduciaries to take control of the affairs of the respective companies. Pet. App. A-3. At the time of the seizures, BCCI had hundreds of thousands of depositors in 69 countries throughout the world. The Court Appointed Fiduciaries have estimated that the deficiency between assets and liabilities of the two principal BCCI operating subsidiaries, BCCI SA and BCCI Overseas, amounts to $10.5 billion.

The collapse of entities of the breadth and complexity of BCCI has created unprecedented worldwide problems and has precipitated a furious scramble for the remains of these hopelessly insolvent companies. The Court Appointed Fiduciaries have been judicially charged with the responsibility to realize and maximize the recovery of BCCI's assets, which are to be distributed on the basis of equal treatment among depositors and creditors worldwide in the insolvency proceedings now pending in Luxembourg and the Cayman Islands. Appendix to Court Appointed Fiduciaries' Brief in Opposition to Petition for Writ of Certiorari. ("Opp. App.") 22a. Through the Plea Agreement described below, the assets of BCCI located in the United States which have been or will be forfeited, an amount likely to exceed $1 billion, will be a significant source of funds available to compensate the innocent victims of BCCI.

B. Proceedings Below

1. *The Plea Agreement*

In connection with a series of criminal and regulatory charges filed against BCCI in the United States, the Court Appointed Fiduciaries and representatives of the Department of Justice, the District Attorney of New York, the Federal Reserve and numerous other state and federal agencies commenced negotiations toward a comprehensive Plea Agreement, which was signed and filed in the district court on December 19, 1991. Opp. App. 20a-48a. The Plea Agreement was presented to and approved by courts in Luxembourg and the Cayman Islands supervising the worldwide liquidation of the BCCI entities. Pet. App. A-4.

The Plea Agreement required BCCI, through the Court Appointed Fiduciaries, to plead guilty to federal and state criminal charges and to agree not to contest charges filed by the Federal Reserve. It further provided that the district court would enter an order pursuant to 18 U.S.C. § 1963(a) forfeiting all BCCI assets located in the United States. Under the Plea Agreement, the Attorney General agreed that half of the forfeited assets would be transferred to the Worldwide Victims and Creditors Compensation Fund administered by the Court Appointed Fiduciaries. The remaining half would be used at the discretion of the Attorney General for various enumerated purposes, including "restitution to victims of BCCI, which may include remission to the Court Appointed Fiduciaries . . . for the purpose of facilitating an increase in assets available for distribution by the Court Appointed Fiduciaries to innocent worldwide victims of BCCI . . . ." Opp. App. 31a-32a.

The Plea Agreement was recognized by the courts that approved it as the best settlement that could practically be obtained for the innocent depositors and creditors. It resolved all charges, eliminating the risk that *all* of BCCI's forfeited assets would be retained by the United

States and assuring that substantial assets would be made available to worldwide victims—including the depositors whom the instant Petitioners purport to represent. The U.S. assets of BCCI could then be distributed with other assets in an orderly and fair manner through global proceedings, thereby preventing piecemeal and unfair distribution of assets to individual claimants at the expense of the general body of creditors and depositors worldwide.

The Plea Agreement was challenged by putative U.S. creditors who sought in the bankruptcy court in New York to enjoin the acceptance of the agreement by the district court. *See In re Smouha*, 136 B.R. 921 (S.D.N.Y.), *appeal dismissed*, 979 F.2d 845 (2d Cir. 1992). As Judge Keenan found, such creditors were "essentially seeking not only to 'cut in line' ahead of innumerable other BCCI creditors and depositors, but to derail a Plea Agreement of tremendous sociopolitical significance that will ultimately send [substantial assets] to the worldwide 'victims' fund." *Id.* at 928.

After the challenges in New York failed, other putative creditors sought to prevent acceptance of the Plea Agreement by the district court. Rejecting those requests, the district court concluded:

> [T]he plea agreement now before the Court reflects on a truly global measure extraordinary efforts and amazing cooperation of a multitude of signatories representing a myriad of jurisdictions to fully settle actions against the corporate defendants, which had operated in 69 countries around the globe, and through that plea resolution, to locate and protect all realizable assets of BCCI for the ultimate benefit of the depositors, creditors, United States financial institutions, and other victims of BCCI. The promise of the plea agreement is that those extraordinary efforts, that amazing cooperation, shall continue.
>
> * * * *

> Through the world-wide victims fund to be created pursuant to the agreement, innocent victims of BCCI's wrongdoing can recover at least a portion of lost assets in as fair a manner as possible—equitable, orderly, and expeditious. Because the fund will be administered on a global scale through unified proceedings, piecemeal and unfair distribution can be avoided.

Opp. App. 52a-53a.

2. *The Claims by Petitioners*

In the district court, Petitioners represented themselves to be a class of all BCCI depositors worldwide who were plaintiffs in a RICO action styled *Hamid v. Price Waterhouse*, 15 RICO Law Rep. 1234 (C.D. Cal. 1992), *aff'd*, 51 F.3d 1411 (9th Cir. 1995), Pet. App. A-35-72 (*"Hamid"*), filed shortly after the closing of BCCI. They claimed *all* of the money forfeited under the first and second forfeiture orders. The result of the instant claims have been that to date *none* of the $451 million collected in those orders has been available to go to victims.

In the three-page submissions setting forth their claims, Petitioners asserted no particular property interest or theory of recovery, but instead simply referenced their third amended complaint in *Hamid*. That complaint was subsequently dismissed with prejudice by the United States District Court for the Central District of California. Pet. App. A-72. The United States Court of Appeals for the Ninth Circuit unanimously affirmed the dismissal holding that Petitioners had no standing to assert the claims and were engaged in an inappropriate effort "to jump ahead of other creditors in priority and obtain greater shares of the failed bank's assets . . . ." *Hamid v. Price Waterhouse*, 51 F.3d 1411, 1420 (9th Cir. 1995), Opp. App. 18a. In reaching its decision, the Ninth Circuit cited, with approval, the decision of the

District of Columbia Circuit which is the subject of the instant petition.[1]

3. *The District Court Decision*

In rejecting Petitioners' claims, the district court (Judge Joyce Hens Green) first noted that there was a serious question whether Petitioners could properly claim to represent the BCCI depositors, since their motion for class certification in the California case had never been granted, that case had been dismissed, and no motion for class certification had even been filed in this proceeding. Pet. App. A-22. The court then reviewed the shifting theories under which Petitioners had sought to establish their entitlement—as tort claimants in their filed claims, as general creditors during some of their argument to the court, and still later during that argument as the beneficiaries of a constructive trust. Pet. App. A-25-26. "Generously" treating petitioners as though they had alleged a constructive trust theory, Pet. App. A-26, and treating the allegations in the claim as true, Pet. App. A-27, the district court exercised its discretion to refuse the request for imposition of a constructive trust on equitable grounds because to do so would "cause a gargantuan disruption of the global liquidation . . . [and] significantly harm the abilities of other BCCI creditors to recover fair portions of lost funds." Pet. App. A-28.[2]

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[1] Contrary to Petitioners' suggestion, Petition for Writ of Certiorari ("Petition") at 8, the Ninth Circuit did not rely on issues of ripeness in denying their claim but squarely held that these Petitioners lack standing to assert the claims they were advancing. Opp. App. 18a-19a.

[2] Similarly, the court dismissed the Petitioners' claims as general creditors on the grounds that they had no legal interest in any identifiable asset of BCCI which had been forfeited, could not claim "vested" or "superior" interest to any asset, and could not meet the § 1963(1)(6)(B) requirement of being a "bona fide purchaser for value." Pet. App. A-29-30. Petitioners' general creditor theory is not in issue on this petition.

4. The Court of Appeals Decision

A unanimous panel of the Court of Appeals for the District of Columbia Circuit affirmed the order of the district court. While the district court held, as a matter of equity, that a constructive trust should not be imposed in the unusual circumstances of this case, the court of appeals held, as a matter of law, that a constructive trust cannot take precedence over forfeiture. The court ruled that a constructive trust is a judicially-imposed remedy that attaches as a consequence of litigation. As such, it cannot serve to establish the "vested" or "superior" interest necessary to defeat the government's forfeiture that attaches, by statute, at the time of the underlying criminal activity. Having resolved the case based on the statutory relation-back requirement, the court of appeals had no occasion to address the equitable considerations that persuaded the district court, under the particular circumstances of this case, to deny imposition of the equitable remedy of a constructive trust. Pet. App. A-11-12.

REASONS FOR DENYING THE WRIT

This case is not an appropriate vehicle for addressing general issues concerning the rights of innocent third parties in RICO forfeiture proceedings. The purported split among the courts of appeal over the narrow issue which Petitioners argue justifies granting the writ—whether a constructive trust can trump the government's forfeiture interest—is illusory. In fact, the court below is the only court to have addressed the impact of the relation-back requirement upon the availability of a constructive trust in the forfeiture setting. There is thus no genuine split among the circuits that would make it appropriate for this Court to grant certiorari.

Moreover, quite apart from the absence of a split among the circuits, the narrow question regarding the interplay between constructive trust law and forfeiture rules is not presented here in a manner amenable to this Court's review. Petitioners do not purport to represent

a group of individuals with claims to particularized, traceable assets of BCCI that might appropriately be subject to a constructive trust; rather, they are attempting to usurp the role of the Court Appointed Fiduciaries, who represent all the depositors of BCCI, and take for themselves the role of liquidators of these insolvent enties. Because Petitioners have struggled unsuccessfully to define a legitimate role for themselves, they have struggled as well to define a coherent theory of recovery. As a result, they only raised their constructive trust argument at oral hearing as an afterthought, and the record is thus devoid of the facts necessary for this Court to consider the presented question. Certiorari would be particularly inappropriate here because it is highly unlikely this Court's resolution of the legal issue presented would affect the district court's prior rejection of these claims on equitable grounds and, hence, would not change the ultimate outcome. However, the delays associated with certiorari review and any remand would surely impair the ability of the Court Appointed Fiduciaries to expedite an equitable distribution to BCCI's long-suffering victims.

I. THERE IS NO GENUINE CONFLICT AMONG THE CIRCUITS CONCERNING THE NARROW ISSUE PRESENTED BY THIS CASE.

Petitioners spend considerable effort setting forth the legislative history of the amendments which granted innocent third-parties a right to challenge the forfeiture of assets in which they claim an interest. Petition at 15-21. Petitioners then wrongly suggest that a grant of certiorari would provide an opportunity to resolve a conflict among the circuits concerning the effect of a constructive trust on the government's forfeiture rights and provide useful guidance to the lower courts concerning the appropriate role and rights of such third parties in forfeiture proceedings. In fact, this case presents no such opportunity.

The only issue of forfeiture law raised by this case is the narrow issue decided by the court of appeals concerning the interplay of the constructive trust remedy and the forfeiture statute.[3] Petitioners argue that certiorari should be granted to resolve a conflict between the District of Columbia Circuit's resolution of that issue in this case and decisions of the Second, Sixth and Seventh Circuits in what Petitioners contend are similar cases.[4] Review of the decisions cited by Petitioners reveals, however, that none addressed the issue decided by the court below—whether the relation-back doctrine in the forfeiture statute is inconsistent with the imposition of a constructive trust. Accordingly, there is no genuine conflict for this Court to resolve.

In *Schwimmer*, the court discussed whether the equitable nature of a constructive trust disqualified it from being a "legal" interest as required by Sec. 1963(1)(6)(A) and concluded, as did the District of Columbia Circuit in this case, that it did not. 968 F.2d at 1582. The court then remanded the case for a determination as to whether the factual predicate for imposing a constructive trust had been established. *Id.* at 1584. In *Campos*, the

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[3] Petitioners have abandoned the argument, which has been repeatedly rejected, that general creditors have sufficient legal interest in specific property to challenge a forfeiture. *See United States v. Schwimmer*, 968 F.2d 1570, 1581 (2d Cir. 1992) ("a general creditor has no interest in particular assets or funds that warrants an amendment of an order of forfeiture under § 1963(1)(6)(A)."), *United States v. Campos*, 859 F.2d 1233, 1239 (6th Cir. 1988); *see also United States v. $20,193.39 U.S. Currency*, 16 F.3d 344, 346 (9th Cir. 1994) (holding in a civil forfeiture that "[u]nlike secured creditors, general creditors cannot claim an interest in any particular asset that makes up the debtor's estate. For this reason, the federal courts have consistently held that unsecured creditors do not have standing to challenge the civil forfeiture of their debtors' property.")

[4] *See United States v. Schwimmer*, 968 F.2d 1570 (2d Cir. 1992), *United States v. Campos*, 859 F.2d 1233 (6th Cir. 1988), and *United States v. Marx*, 844 F.2d 1303 (7th Cir. 1988).

court merely listed constructive trust among a litany of the types of property interests which might be superior to the government's claim, but the court engaged in no further analysis of the subject, and took no steps to impose a constructive trust. 859 F.2d at 1239. In *Marx*, the court addressed whether state law would recognize a constructive trust on the facts presented, 844 F.2d at 1307-09, but did not discuss the relationship of a constructive trust to the forfeiture statute. At no time did these courts even consider, much less resolve, whether imposition of a constructive trust was consistent with the relation-back doctrine of RICO's statutory forfeiture scheme, the basis of the court of appeals' decision here.[5]

Marx, the only case in which a trust was actually imposed, is particularly instructive in this regard. The trust at issue in *Marx* was not one which was sought as a remedial device to prevent the unjust enrichment of a malefactor, which is the basis for Petitioners' argument that such a trust should be imposed here. Rather, the trust imposed in *Marx* resulted from the fact that the assets in question, stock shares, had been given to the defendant to hold for the benefit of claimant. 844 F.2d at 1306-07. Claimant was therefore entitled to the assets as the beneficiary of an express trust or, under Wisconsin law, as the beneficiary of a "constructive" trust if the defendant's illegal activities that gave rise to the forfeiture breached the express trust. *Id.* at 1307-08. The facts in *Marx* present none of the concerns that underlie the decision below, and there is no genuine conflict between the two decisions.

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[5] As the court below found, (Pet. App. A-12), the relation-back doctrine is an integral part of RICO's statutory remedial scheme which explicitly vests title to forfeited assets in the United States at the time of the criminal act. See 18 U.S.C. § 1963(e) ("All right, title and interest in property described in subsection (a) [forfeitable property] vests in the United States upon the commission of the act giving rise to forfeiture under this section.")

Because they do not address the interplay between the remedial device of a constructive trust and the relation-back requirement in the forfeiture statute, these three decisions are not in conflict with the decision below. This Court should allow this narrow question—the relationship between the relation-back doctrine and constructive trusts—to develop in the courts of appeals, should the issue again arise in future cases, and grant certiorari to review the issue only if a true conflict develops. It would be premature to grant certiorari now.

II. THIS IS NOT AN APPROPRIATE CASE IN WHICH TO ADDRESS QUESTIONS OF GENERAL APPLICABILITY CONCERNING THE TREATMENT OF THIRD PARTIES IN RICO FORFEITURE PROCEEDINGS.

Even if an issue worthy of consideration on certiorari were presented, this case would be an inappropriate vehicle for its consideration. The collapse, regulatory seizure, multiple criminal investigations, prosecutions, and related civil proceedings of BCCI represent an unprecedented international insolvency. The Plea Agreement and resulting forfeiture growing out of this unprecedented insolvency are equally unique. The Court Appointed Fiduciaries not only represent the institutions in resolving criminal and civil liability, they also represent the interests of BCCI's worldwide depositors and other creditors in trying to obtain as much as possible for these victims of BCCI—including petitioners—so that they may recover at least some of what they have lost through coordinated global insolvency proceedings that seek to treat them fairly and non-preferentially.

This unusual factual background renders this an inappropriate vehicle for the development of rules of general applicability that would meaningfully guide lower courts in the application of RICO's forfeiture provisions to other matters.

A. Petitioners Do Not Represent The Interests Which They Purport To Advance In This Matter.

Notwithstanding their claims (Petition at 4), Petitioners do not represent the worldwide depositors of BCCI. Their attempt to act as class representatives for these depositors was rebuffed by the district court in California and the Ninth Circuit which dismissed their complaint. Moreover, Petitioners' claim to represent this class was never presented to the courts below in a manner that would have allowed them to address the adequacy of their purported representative status. Hence, major questions of standing will inescapably confound any disposition of Petitioners' claims, whatever theory of recovery they advance.

In sharp contrast to Petitioners' self-appointed status, the Court Appointed Fiduciaries, who caused BCCI to accept the Plea Agreement and consent to the forfeiture here challenged, are the judicially-appointed representatives actually (not constructively) entrusted to protect the depositors. It was the judgment of the Court Appointed Fiduciaries, explicitly concurred in by their appointing courts,[6] that agreeing to forfeiture pursuant to the terms of the Plea Agreement was in the best interest of the depositors. Petitioners' authority to act as class representatives has never been recognized; they are not subject to the limitations and supervision generally imposed upon class representatives;[7] they should not be allowed to impose their views to override the considered judgment of the Court Appointed Fiduciaries and their supervising courts.[8]

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[6] *See supra* p. 5.

[7] *See Gulf Oil Co. v. Bernard*, 452 U.S. 89, 100 (1981) ("Because of the potential for abuse, a district court has both the duty and the broad authority to exercise control over a class action and to enter appropriate orders governing the conduct of counsel and parties.")

[8] *See In re Sunrise Securities Litigation*, 916 F.2d 874, 889 (3d Cir. 1990) (rejecting RICO class action by depositors because

B. The Record In This Case Has Not Been Sufficiently Developed To Allow Thoughtful Consideration Of The Issue Presented By Petitioners.

While Petitioners are asking this Court to consider whether, and under what circumstances, a constructive trust can defeat the government's claim to forfeited assets, the record below is devoid of facts concerning the nature and scope of the trust which Petitioners seek to have imposed. Petitioners are, in essence, asking this Court to interpret the law in a vacuum.

The absence of a meaningful record is explained in part by the fact that the claim for a constructive trust was an afterthought, first requested by Petitioners at the end of the hearing in the district court. Petitioners' initial submission as well as their brief in the district court simply relied upon their since-dismissed complaint in *Hamid* and contained no mention of a constructive trust. Petitioners first suggested constructive trust as a theory in oral argument before the district court, and they offered no explanation concerning the nature and scope of the trust that they proposed. Pet. App. A-26. Similarly, while pressing their constructive trust theory in the court of appeals, Petitioners again failed to particularize the parameters of their requested remedy or to provide any of the facts that would allow the court to determine how and to what extent the constructive trust they sought to have imposed would actually be applied to the forfeited assets.

That the constructive trust theory was offered as an afterthought is not surprising given that a trust is not what Petitioners are truly seeking. The petition sets forth black letter rules concerning the circumstances that must exist before the common law will impose a constructive

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it would threaten settlement negotiated by the FDIC as receiver and would interfere with ratable distribution to depositors and creditors).

trust. Petition at 23-24. The purpose of the remedy is to prevent the party holding legal title to the asset from being allowed wrongfully to retain the benefit of the asset. Accordingly, as a remedial device, the common law creates the fiction that the asset is held "constructively" in trust and is required to be paid over by the wrongdoer to the injured party.

In the instant case there can be no claim that the assets at issue will be beneficially retained by any wrongdoer. What Petitioners are truly seeking is not the creation of a trust—there is already a trust in place in the form of the Worldwide Victims Fund. What Petitioners want is the right to be placed in charge of how those funds are distributed, to usurp the role of the Court Appointed Fiduciaries in liquidating BCCI's U.S. estate. They seek to assert a constructive trust only because their other attempts to gain control over the assets have been rebuffed. In these circumstances, this case does not present a record amenable to the promulgation of forfeiture rules of general applicability.

C. Granting Certiorari Will Have No Effect On The Ultimate Result Of This Matter And Will Delay Compensation To The Depositors And Creditors Of BCCI.

A final reason why this is an inappropriate case in which to address general questions of RICO forfeiture law is that this Court's decision would not affect the ultimate result in this matter. The review process itself, however, would significantly delay compensation to the depositors and other creditors of BCCI, thereby harming the very people Petitioners purport to represent. The Court Appointed Fiduciaries respectfully submit that granting a writ of certiorari in such circumstances is not an appropriate use of the Court's discretionary review authority.

Even if this Court were to rule that in some circumstances a constructive trust may limit a forfeiture, the

result for Petitioners' claim would not change. The district court has already held that the record simply does not support the imposition of a constructive trust in the circumstances of this case. Pet. App. A-20.[9] The extensive record developed by the district court in approving the Plea Agreement compelled this result when the district court first considered the issue; it will compel the same result should this case be remanded by this Court. That record led the district court to conclude that forfeiture, followed by remittance to the Worldwide Victims Fund, is the best way to achieve a prompt and fair distribution to all of BCCI's depositors and creditors. Given that prior determination, and the disruption in the global liquidation which the district court found would be caused by imposing a constructive trust, the district court's determination not to impose a trust represents a sound exercise of discretion which this Court, regardless how it may choose to rule on the legal interplay between legitimate constructive trusts and the rules of forfeiture, would have no occasion to upset.

The appropriateness of the district court's decision is clear in light of the decision of the Tenth Circuit in *Downriver Community Fed. Credit Union v. Penn Square Bank*, 879 F.2d 754, 763 (10th Cir. 1989), *cert. denied*, 493 U.S. 1070 (1990). There, as here, certain depositors sought to impose a constructive trust over an insolvent bank's assets rather than recovering ratably under the applicable statutory liquidation scheme. While recognizing the general proposition that a depositor has the right

[9] As they must, Petitioners concede that a constructive trust is an equitable remedy. Petition at 23-24. *See Healy v. Commissioner*, 345 U.S. 278, 282 (1953) ("[a] constructive trust is a fiction imposed as an equitable device for achieving justice"). As such, it is left to the court's discretion to impose the remedy only in circumstances where doing so would work justice. Here, the district court determined that imposing a constructive trust would work an injustice.

to recover deposits which were fraudulently induced, the court declined to impose a constructive trust, stating:

> . . . full restitution may be denied when it would sufficiently disrupt the orderly administration of the receiver's estate or otherwise result in inequitable treatment to other similarly situated depositors.

Downriver, 879 F.2d at 763 (citation omitted). The *Downriver* court stated, "In the absence of a false and fraudulent representation made specifically to the plaintiff, with respect to the financial condition of the bank, the plaintiff has no equity superior to the rights of other depositors or creditors of the bank . . . ." *Id.* at 764 (citation omitted). There, as here, the plaintiff depositors contended "that we might avoid this unequal treatment by permitting all depositors situated similarly to the plaintiffs to sue as a class to establish constructive trusts," but the court found that "to allow such suits would potentially jeopardize the orderly administration of the receiver's estate . . . ." *Id.* The court concluded, "Any remedy for fraudulent representations that affects, or potentially affects, all creditors belongs to the receiver, who asserts such claims for the benefit of all creditors." *Id.* (citation omitted). The court held that the assets of the insolvent bank were to be distributed ratably by the receiver.

The court's reasoning in *Downriver* applies with equal force in this case. Petitioners can assert no particularized harm; there would be tremendous disruption to orderly administration of the estate if a constructive trust were imposed; and, in all events, the right to act for the benefit of all depositors and to deal with generalized claims belongs to the Court Appointed Fiduciaries.

Moreover, the district court further found that, in any event, these Petitioners could not possibly meet the requirement for a constructive trust to trace the funds de-

posited directly to the asset over which a trust is sought.[10] The district court recognized the practical impossibility of engaging in that necessary tracing exercise in circumstances of this case where the claims of numerous separate depositors are at issue and where the deposits were made over a period of twenty years in an institution that operated in sixty-nine countries. Pet. App. A-28.

Nothing has changed since the district court made its determination not to impose a constructive trust—other than the Ninth Circuit's rejection of the civil claims upon which Petitioners' request for a constructive trust was based—and the rationale of *Downriver* remains applicable. Accordingly, even if this Court were to determine that in some cases a constructive trust can limit a forfeiture, on remand no trust would be imposed in this case. Regrettably, while this case remains under review, distribution of forfeited funds to BCCI's innocent depositors and creditors through the Worldwide Victims Fund will be delayed. This Court should not act to so penalize the innocent depositors and creditors in this case in the interest of deciding how to treat other innocent third parties in future cases.

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[10] *See United States v. Benitez*, 779 F.2d 135, 140 (2d Cir. 1985) ("It is hornbook law that before a constructive trust may be imposed, a claimant to a wrongdoer's property must trace his own property into a product in the hands of the wrongdoer," *citing* 5 A. Scott, *Law of Trusts*, § 521 (3d ed. 1967)).

CONCLUSION

For the reasons set forth above, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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Dated: June 7, 1995

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APPENDIX A

UNITED STATES COURT OF APPEALS
NINTH CIRCUIT

No. 92-56085
D.C. No. CV-91-4483-CBM

AKHTAR HAMID, on Behalf of Himself and all Others Similarly Situated,
Plaintiffs-Appellants,

v.

PRICE WATERHOUSE, PRICE WATERHOUSE/U.K.; PRICE WATERHOUSE WORLD FIRM LTD.; PRICE WATERHOUSE/U.S.; ERNST & YOUNG; ABU DHABI, EMIRATE OF ABU DHABI; ABU DHABI INVESTMENT AUTHORITY; BANK OF AMERICA CORPORATION, BANKAMERICA CORP.; BANK OF AMERICA NT & SA; HILL & KNOWLTON; CONCORDE FINANCE & INVESTMENTS, GRP INVESTMENTS; INTERREDEC, INC.; INTERREDEC SOUTHERN CO.; *et al.*; FIRST AMERICAN CORP., FIRST AMERICAN BANKSHARES; PAUL ADAMS; JACK BEDDOW; A. VINCENT SCOFFONE; T. BERTRAM LANCE; INDEPENDENCE BANK; MANUEL NORIEGA; FULVIO DOBRICH; ROBERT ALTMAN; CLARK CLIFFORD; CLIFFORD & WARNKE,
Defendants-Appellees.

No. 92-56198
D.C. No. CV-91-4483-CBM

AKHTAR HAMID, on Behalf of Himself and all Others Similarly Situated,
Plaintiffs-Appellees,

v.

PRICE WATERHOUSE, PRICE WATERHOUSE/U.K.; PRICE WATERHOUSE WORLD FIRM LTD.; PRICE WATERHOUSE/U.S.; ERNST & YOUNG; ABU DHABI, EMIRATE OF ABU DHABI; ABU DHABI INVESTMENT AUTHORITY; BANK OF AMERICA CORPORATION, BANKAMERICA CORP.; BANK OF AMERICA NT & SA; HILL & KNOWLTON; CONCORDE FINANCE & INVESTMENTS, GRP INVESTMENTS; INTERREDEC, INC.; INTERREDEC SOUTHERN CO.; *et al.*; T. BERTRAM LANCE; INDEPENDENCE BANK; MANUAL NORIEGA; FULVIO DOBRICH; ROBERT ALTMAN; CLARK CLIFFORD; CLIFFORD & WARNKE,

Defendants,

and FIRST AMERICAN CORP., FIRST AMERICAN BANKSHARES, INC.; PAUL G. ADAMS; JACK BEDDOW; A. VINCENT SCOFFONE;

Defendants-Appellants.

No. 92-56199
D.C. No. CV-91-4483-CBM

AKHTAR HAMID, on Behalf of Himself and all Others Similarly Situated,

Plaintiffs-Appellees,

v.

PRICE WATERHOUSE, PRICE WATERHOUSE/U.K.; PRICE WATERHOUSE WORLD FIRM LTD.; PRICE WATERHOUSE/U.S.; ERNST & YOUNG; ABU DHABI, EMIRATE OF ABU DHABI; ABU DHABI INVESTMENT AUTHORITY; BANK OF AMERICA CORPORATION, BANKAMERICA CORP.; BANK OF AMERICA NT & SA; HILL & KNOWLTON; T. BERTRAM LANCE; INDEPENDENCE BANK; MANUEL NORIEGA; ROBERT ALTMAN; CLARK CLIFFORD; CLIFFORD & WARNKE, FIRST AMERICAN BANKSHARES, INC.; JACK W. BEDDOW; PAUL G. ADAMS; A. VINCENT SCOFFONE,

Defendants,

and CONCORDE FINANCE & INVESTMENTS; INTERREDEC, INC.; INTERREDEC SOUTHERN COMPANY, INC.; WESLEY COMPANY, INC.; RIVER OAKS, INC.; RIVER OAKS INVESTMENTS, INC.; STERLING BLUFF, INC.; GRP INVESTMENTS N.V.,

Defendants-Appellants.

Appeals from the United States District Court
for the Central District of California
Consuelo B. Marshall, District Judge, Presiding

Argued and Submitted January 31, 1994

Filed April 7, 1995

Before: BROWNING, BOOCHEVER and KLEINFELD, Circuit Judges.

KLEINFELD, Circuit Judge:

This is an appeal from dismissal of a class action by depositors in the Bank of Credit & Commerce International ("BCCI"). The issues we resolve involve timeliness of appeal, judicial recusal, the derivative nature of the depositors' RICO claims, and the application of the Alien Tort Statute.

We have jurisdiction over depositors' claims pursuant to 28 U.S.C. § 1291. We review the district court's dismissal for failure to state a claim de novo. Oscar v. University Students Co-Operative Ass'n, 965 F.2d 783, 785 (9th Cir. 1992) (en banc). A district court's refusal to disqualify the sitting judge may be reversed only for an abuse of discretion. Thomassen v. United States, 835 F.2d 727, 732 (9th Cir. 1987).

I. Facts

This case was dismissed for failure to state a claim upon which relief can be granted, under Federal Rule of Civil Procedure 12(b)(6). We therefore are bound to evaluate whether the complaint states causes of action on the assumption that appellants could prove the averments. Pillsbury, Madison & Sutro v. Lerner, 31 F.3d 924, 928 (9th Cir. 1994).

Appellants claim to represent depositors of funds in what they call "the constellation of banks known as Bank of Credit & Commerce International ("BCCI")." They do not sue the "constellation of banks." They sue seventy-seven people, firms, and a foreign country.

The complaint alleges that the seventy-seven defendants illegally acquired various banks in the United States, caused deposits to be misused and misappropriated, and, by misrepresenting facts about BCCI, delayed the day when regulators would shut it down. By making the bank appear to be in better financial condition than it really was, some defendants are alleged to have enabled it to attract deposits which it otherwise would have been unable to obtain. Most of the complaint consists of elaborating the egregiousness of the misuse and misappropriation of funds, including allegations of financing international terrorism, narcotics, and arms dealing, and using bribery and fraud to keep governments from interfering with BCCI's and the defendants' activities, along with extensive polemical elaborations such as pointing out that the "BCCI pirates" were "men in business suits." The looting which allegedly caused the bank to be unable to pay the depositors included loans to insiders which were intended never to be repaid.

The district court dismissed depositors' RICO claims without leave to amend after they filed their third amended complaint. Appellants' arguments go to whether their claims were such that relief could be granted, not

whether they could have stated valid claims had they been given another chance to amend.

Facts dealing with particular issues are explicated more fully below, in the discussions of the issues.

II. Analysis

A. Appellate Jurisdiction

We must first decide whether the appeal was untimely, depriving us of jurisdiction. The complaint went through four iterations. The district court dismissed the third amended complaint on April 30, 1992. On May 11, the plaintiffs moved to recuse Judge Marshall, on the ground that the employment plans of her law clerks required her to be disqualified. They also filed a motion under Federal Rule of Civil Procedure 52(b) to vacate the April 30 judgment on the basis of Judge Marshall's alleged disqualification. They did not appeal at that time.

Judge Marshall issued a corrected version of her order and judgment May 20. Judge Byrne denied the motion to recuse Judge Marshall July 9. Judge Marshall then denied the Rule 52(b) motion July 27. Plaintiffs filed their notice of appeal August 19. The appeal is directed to the merits of the dismissal, not just to whether Judge Marshall should have been recused. The appellate jurisdiction issue is whether the appeal was timely as to the merits. On its face, an August 19 appeal from a May 20 judgment comes more than thirty days after the judgment. See Fed. R. App. P. 4(a)(1).

Appellees argue that the motion to vacate the judgment could not properly be characterized as a Rule 52(b) motion, that it should not be characterized as a Rule 59 motion which would toll the running of the thirty days, and that as a Rule 60(b) motion, it would not toll the thirty days. They are correct about Rule 52(b). That rule governs motions to amend findings of fact. This case was dismissed before trial; the district court did not

hear evidence or make findings. Nor was the motion directed toward correction of any findings. It related solely to recusal because of the law clerks' conflcts of interest.

Appellees are also correct that at the time the notice of appeal was filed, a Rule 60(b) motion was not among those which would toll the thirty days for filing notice of appeal. Fed. R. App. P. 4(a)(4).[1] We are nevertheless satisfied that appellants' motion, denominated incorrectly as a Rule 52(b) motion, should properly be deemed a Rule 59(e) motion. If a timely Rule 59 motion is filed, the thirty days for appeal does not begin to run until entry of the order on that motion. Fed. R. App. P. 4(a)(4).

The motion to vacate on the ground that the judge should have recused herself appears on its face to be no more of a Rule 59 than a Rule 52(b) motion, for the same reasons. Nevertheless, our precedents require that we treat a motion to vacate an order of dismissal as a Rule 59(e) motion. Mir v. Fosburg, 646 F.2d 342, 344 (9th Cir. 1980). Our precedents also require that we treat a motion which could have been made as a timely Rule 59 motion as though it were so made. Sierra On-Line, Inc. v. Phoenix Software, Inc., 739 F.2d 1415, 1419 (9th Cir. 1984). This liberality has the practical effect of letting appeal wait until the timely post-trial motion has been decided. The 1993 amendments to Federal Rule of Appellate Procedure 4(a)(4) will no doubt obviate this confusion.[2]

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[1] The notice of appeal was filed August 19, 1992. The amendment at Fed. R. App. P. 4(a)(4)(F), which provides that the time for appeal runs from the entry of the order disposing of a motion for relief under Rule 60, was not yet in effect. Because we conclude that appeal was timely under the rules in effect in 1992, we do not have occasion to decide whether the 1993 amendment would affect pending appeals filed prior to the date of the amendment.

[2] Fed. R. App. P. 4(a)(4), as amended effective December 1, 1993, provides as follows: (4) If any party makes a timely motion

The appeal was timely as to the merits, not just as to recusal, so we have jurisdiction.

B. Recusal

The appellants claimed below, and argue here, that Judge Marshall should have recused herself from the case because of her law clerks' employment plans. The motion to recuse Judge Marshall and vacate the judgment on this ground was denied by a different district judge, Judge Byrne. We review the district court's denial of the recusal motion for abuse of discretion, Thomassen v. United States, 835 F.2d 727, 732 (9th Cir. 1987), and find none.

A federal judge must disqualify herself from any proceeding in which her impartiality might reasonably be questioned. 28 U.S.C. § 455(a). The test for recusal in this circuit is "'whether a reasonable person with knowledge of all the facts would conclude that the judge's impartiality might reasonably be questioned.'" Milgard Tempering, Inc. v. Selas Corp. of Am., 902 F.2d 703, 714 (9th Cir. 1990) (quoting Herrington v. Sonoma Cty., 834 F.2d 1488, 1503 (9th Cir. 1987)). Depending on how an individual judge manages her chambers, a law clerk's role in her decisionmaking may be quite significant. Even if the judge has no reason to recuse herself based upon her own circumstances, a law clerk's

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of a type specified immediately below, the time for appeal for all parties runs from the entry of the order disposing of the last such motion outstanding. This provision applies to a timely motion under the Federal Rule of Civil Procedure: . . . (B) to amend or make additional findings of fact under Rule 52(b), whether or not granting the motion would alter the judgment; (C) to alter or amend the judgment under Rule 59; . . . (F) for relief under Rule 60 if the motion is served within 10 days after entry of judgment. . . . The amendment changed the wording, changed the numbering of the subsections, and added the reference to Rule 60. Under the rule previously in effect, reference was made to motions under Rules 50(b), 52(b), and 59, but not 60.

relationships might cause the impartiality of decisions from that judge's chambers in which the clerk participates reasonably to be questioned.

However, "[i]f a clerk has a possible conflict of interest it is the clerk, not the judge, who must be disqualified. . . . [A] law clerk's acceptance of future employment with a law firm would [not] cause a reasonable person to doubt the judge's impartiality so long as the clerk refrains from participating in cases involving the firm in question." Hunt v. American Bank & Trust Co., 783 F.2d 1011, 1016 (11th Cir. 1986), quoted in Milgard, 902 F.2d at 714.

Two of Judge Marshall's law clerks' employment relationships are at issue, and they are different. Clerk One served as Judge Marshall's law clerk during the earliest stages of the case at bar, and he subsequently became an associate at Debevoise & Plimpton ("the Debevoise firm"). The Debevoise firm represents one of the named defendants, Price Waterhouse/United States. Clerk One filed a sworn declaration stating that he did no work at all on the case at bar while he clerked for Judge Marshall. He says he read the complaint (a public document) on his last day clerking and put it in Judge Marshall's file, but did not ever discuss the case with the judge or have any other involvement with the case during his clerkship. At the time he left his clerkship, Clerk One did not know that the Debevoise firm would subsequently appear for a defendant.

Clerk One had no involvement in the case at bar which would give rise to a disqualification of Judge Marshall. A reasonable person knowing all the facts regarding Clerk One's relationship with the Debevoise firm and his lack of involvement in the case at bar would not conclude that the impartiality of Judge Marshall's decisions in the case should be questioned. The rule laid down in Hunt and Milgard would prevent recusal on account of Clerk One's relationship with the Debevoise firm because Clerk

One did not work on the case at bar. His advice to and research for Judge Marshall could not be tainted if he gave no advice and did no research.

Judge Marshall's other law clerk, Clerk Two, did extensive work on the case. The question regarding Clerk Two is whether he had a disqualifying relationship with a law firm such that Judge Marshall should have taken him off the case. Mr. Lerach, plaintiffs' counsel, filed a declaration asserting that he had learned that (1) Clerk Two was on a "leave of absence" from Skadden, Arps, Slate, Meagher & Flom ("the Skadden firm") during his clerkship with Judge Marshall, (2) the Skadden firm represented Clark Clifford and Robert Altman, defendants in the case at bar, in a criminal case arising out of their involvement with BCCI, and had accepted service of process for them in the case at bar; and (3) Clerk Two "was scheduled" to return to the Skadden firm when he finished his clerkship, but "at the last moment" instead went to work at a different law firm "in the same building as Skadden, Arps and on a contiguous floor."

No reasonable person would suspect that a law clerk was slanting his advice to a judge in favor of a law firm because the clerk subsequently went to work for a different law firm "in the same building . . . on a contiguous floor." It is to filter out fantastic suggestions like this that the word "reasonable" is part of the recusal test.

However, a reasonable person might be concerned whether a law clerk's advice to a judge would be biased in favor of the position taken by a firm, if the law clerk had worked there before his clerkship, was on a leave of absence, and planned to work there after his clerkship. Cf. Hunt, 783 F.2d at 1015. Clerk Two, however, filed a declaration stating that this was not what had happened. He asserted that he had "terminated" his employment at the Skadden firm prior to his clerkship, and although the firm had made him an offer, he had not resumed employment with the firm and had accepted an

offer from a different firm. He also said that during the time he worked on the case at bar for Judge Marshall, he "was unaware" that the Skadden firm represented any clients in matters relating to BCCI, the firm did not appear for anyone in the case, and he had not communicated with anyone in the firm about the case. The Skadden firm in fact has not appeared for any party in the case at bar.

Judge Byrne accepted the truth of Clerk Two's representation that he did not know the Skadden firm had a role of any kind relating in any way to the BCCI case. We conclude that Judge Byrne did not abuse his discretion in deciding that Clerk Two's prior association with the Skadden firm required neither his removal from the case nor Judge Marshall's recusal because of his failure to remove himself.

Because of the very large number of defendants and law firms involved in this case, the likelihood that a law clerk would have some sort of connection to one of them is higher than in most cases, and the likelihood that that connection would matter is lower. A reasonable observer would more likely see any relationship "as implicit in the special circumstances [of the complexity of the case and large number of parties and law firms involved] rather than as an odd coincidence the failure to avoid which might suggest bias." In re Allied-Signal, Inc., 891 F.2d 967, 971-72 (1st Cir. 1989). The question of bias is one of whether a reasonable person with knowledge of all the facts would conclude that the judge's impartiality might reasonably be questioned. It is not a question of whether a line can be drawn connecting a person within chambers to a person or firm related, no matter how remotely, to a party in the case.

We need not determine whether a different conclusion could be reached on the facts. It is enough that Judge Byrne did not abuse his discretion in deciding that Judge Marshall need not have recused herself on account of her

law clerks' professional relationships with the two law firms.

C. Law of Nations

The complaint alleges that the seventy-seven defendants committed "torts in violation of the laws of nations and treaties of the United States." It does not specify which treaties, and the appellate briefs apparently do not dispute the correctness of the district court's dismissal of any claims based on violations of treaties. The complaint alleges the defendants violated the law of nations by causing the bank to loan money to criminals and to insiders and bribing or lying to bank regulators.

Because many of the members of the purported class are aliens, appellants argue the district court had jurisdiction to decide this claim under the Alien Tort Statute, 28 U.S.C. § 1350. The Alien Tort statute provides: "The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." Id. The district court dismissed this cause of action without leave to amend because the depositors did not allege official action or a violation of the law of nations.

The Alien Tort Statute has seldom been invoked, so precedent is sparse for the definition of "law of nations." Analyzing the scope of the Alien Tort Statute, the Second Circuit noted that "although it has been with us since the first Judiciary Act . . . no one seems to know whence it came." IIT v. Vencap, Ltd., 519 F.2d 1001, 1015 (2d Cir. 1975). We have previously stated "[t]he debates that led to the Act's passage contain no reference to the Alien Tort Statute, and there is no direct evidence of what the First Congress intended it to accomplish." Trajano v. Marcos (In re Estate of Ferdinand E. Marcos Human Rights Litig.), 978 F.2d 493, 498 (9th Cir. 1992).

We do not need to reach the issue of whether the law of nations applies to private, as opposed to governmental conduct. See Sanchez-Espinoza v. Reagan, 770 F.2d 202, 206-07 (D.C. Cir. 1985) (law of nations does not reach private, nonstate conduct); IIT, 519 F.2d at 1015 (violation of law of nations arises only when relationship between states or between individual and state is affected). Compare Filartiga v. Pena-Irala, 630 F.2d 876, 880 (2nd Cir. 1980) (act of torture committed by state official violated law of nations) with Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 791, 819 (D.C. Cir. 1984) (per curiam) (Edwards, J., concurring and Bork, J., concurring) (affirming dismissal of action by Israeli citizens against PLO terrorists and distinguishing Filartiga as involving official action). Deciding whether private conduct is subject to the law of nations would not resolve the case, because the complaint alleges that the Emirate of Abu Dhabi and the Abu Dhabi Finance Department were among the wrongdoers.

The wrongs alleged are in substance fraud, breach of fiduciary duty and misappropriation of funds. Although the conduct was international in scope, no violation of what has traditionally been the subject of international law is claimed. International law includes more than international treaties. See e.g., Estate of Marcos, 978 F.2d at 499 (official torture); Filartiga v. Pena-Irala, 630 F.2d 876, 880 (2nd Cir. 1980) (same). But looting of a bank by its insiders, and misrepresentations about the bank's financial condition, have never been in the traditional classification of international law. These are garden variety violations of statutes, banking regulations, and common law. We agree with the view of the Second Circuit, as stated in IIT:

> [w]e cannot subscribe to plaintiffs' view that the Eighth Commandment "Thou shalt not steal" is part of the law of nations. While every civilized nation doubtless has this as a part of its legal system, a

> violation of the law of nations arises only when there has been "a violation by one or more individuals of those standards, rules or customs (a) affecting the relationship between states or between an individual and a foreign state, and (b) used by those states for their common good and/or in dealings inter se."

IIT, 519 F.2d at 1015 (quoting Lopes v. Reederei Richard Schroder, 225 F. Supp. 292, 297 (E.D. Pa. 1963)). That case was conceptually similar to the case at bar, in that it alleged an international scheme of fraud, conversion and corporate waste. See also Filartiga, 630 F.2d at 888-89 (distinguishing official torture, actionable under Alien Tort statute, from IIT). The standards alleged to have been violated by the defendants in the case at bar are not of a kind affecting the relationship between states or between an individual and a foreign state, and used by those states for their common good in dealings inter se.

Our reasons for adopting the IIT rule are well stated in Filartiga:

> The requirement that a rule command the "general assent of civilized nations" to become binding upon them all is a stringent one. Were this not so, the courts of one nation might feel free to impose idiosyncratic legal rules upon others, in the name of applying international law.

Filartiga, 630 F.2d at 881.

Because appellants' claims of fraud, breach of fiduciary duty, and misappropriation of funds are not appropriately considered breaches of the "law of nations" for purposes of jurisdiction under the Alien Tort Statute, Count IV was properly dismissed.

D. RICO

Most of the complaint purports to allege civil RICO claims. The statute provides that "[a]ny person injured in his business or property by reason of a violation of [18 U.S.C. § 1962]" has a cause of action for which treble damages may be recoverable. 18 U.S.C. § 1964(c). Appellants allege that they were depositors in BCCI, and that because it violated the law and collapsed, it failed to pay them the money they were entitled to as depositors. Appellants allege that all four subsections of section 1962 [3] were violated by some or all defendants, by means of predicate acts ranging from wire and mail fraud to drug transactions and weapons dealing. The defendants include seventy-seven firms and individuals alleged to have looted the bank for personal gain, caused it to loan its money to criminals, caused it to appear more sound than it was to bank regulators, and otherwise to have contributed to its wrongful conduct or its inability to pay its depositors. The bank itself is not a defendant.

In order to plead a civil RICO claim, appellants must show that the defendant's violation of section 1962 was

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[3] Section 1962(a) provides that it is "unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity . . . to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce." Section 1962(b) provides that it is "unlawful for any person through a pattern of racketeering activity . . . to acquire or maintain directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce." Section 1962(c) provides that it is "unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity. . . ." Finally, section 1962(d) provides that it is "unlawful for any person to conspire to violate" the preceding three subsections.

the proximate cause of their injury. Holmes v. Securities Investor Protection Corp., 112 S. Ct. 1311, 1317 (1992); Pillsbury, Madison & Sutro v. Lerner, 31 F.3d 924, 928 (9th Cir. 1994). Some of the wrongs alleged would tend to increase rather than reduce the ability of the bank to pay its debts. For those wrongs, the appellants have alleged no proximate cause linking the RICO violations with injury to their property.

Appellants have also pleaded various wrongs which had the effect of making BCCI less able to pay its debts. As depositors, the members of the appellant class are creditors of BCCI. Bank of Marin v. England, 385 U.S. 99, 101 (1966); Brown v. New York Life Ins. Co., 152 F.2d 246, 249 (9th Cir. 1945). They allegedly loaned money to BCCI which, because of various wrongs by defendants, it was unable to pay back. To the extent that the alleged wrongs reduced the ability of the bank to pay its debts, or caused it to be in business for a longer time than it should have been so that it could continue to borrow money from depositors fooled about its true condition, the wrongs would have the practical consequence of harming the depositors.

The question is whether persons whose injury is in this manner indirect have standing to assert a RICO claim. BCCI, the allegedly dishonest and defaulting debtor, is not a defendant. Instead, other people and firms, who allegedly contributed to BCCI's condition, but who themselves had no direct relationship to the appellants and caused them no direct harm, are the defendants. Suppose the "BCCI pirates" looted the bank just as the complaint says. Can a depositor in a bank sue a bank robber?

The standing question has been answered persuasively by the Third Circuit, in Popkin v. Jacoby (In re Sunrise Sec. Litig.), 916 F.2d 874, 880 (3d Cir. 1990). In that case too, depositors of a failed bank sued the insiders whom they claimed looted it and misrepresented its con-

dition. The claims were substantially the same as in the case at bar:

> The essence of the complaint is that defendants misrepresented the financial condition of [the bank] by failing to disclose that they had mismanaged [the bank] rendering the institution insolvent, and that they had employed deceptive operating practices, which prevented federal and state regulators from acting in a timely manner to forestall the insolvency of [the bank].

Id. at 883. The Third Circuit held that depositors asserting a RICO claim because the bank had become unable to pay its debts should be treated the same as shareholders in a corporation. For both classes, where the harm is to all the members, and the injuries claimed by the plaintiffs are not separate and distinct from those to shareholders or depositors generally, the RICO claim is derivative and there is no standing on the part of the shareholders or depositors to assert it.

> The Second Circuit has ruled the same way. As a general rule, wrongdoing by bank officers that adversely affects all depositors creates a liability which is an asset of the bank, and only the bank or its receiver may sue for its recovery.

Adato v. Kagan, 599 F.2d 1111, 1117 (2d Cir. 1979).

Sunrise's analogy to shareholder suits is sound. Creditors of a bankrupt corporation generally do not have standing under RICO. Manson v. Stacescu, 11 F.3d 1127, 1130 (2d Cir. 1993). "The creditor generally sustains injury only because he has a claim against the corporation. The creditor's injury is derivative of that of the corporation and is not caused proximately by the RICO violations." Id. When a creditor suffers injury that is "independent of the firm's fate," his injury is direct and he may pursue his own remedy; otherwise the injury is derivative and the creditor must take his "place in line"

as a creditor in the bankruptcy action. Mid-State Fertilizer Co. v. Exchange Nat'l Bank of Chicago, 877 F.2d 1333, 1336-37 (7th Cir. 1989). Cf. Sparling v. Hoffman Constr. Co., Inc., 864 F.2d 635, 640 (9th Cir. 1988) (shareholder lacks standing to assert RICO claim unless he shows either an injury distinct from that to other shareholders or a special duty owed by the defendant to the shareholder).

The rationale supporting the analogy is compelling. "[P]ermitting depositors to bring individual actions for such injuries [] would invariably impair the rights of other general creditors and claimants with superior interests." Sunrise, 916 F.2d at 887. Under the facts of Sunrise,

> continuation of plaintiffs' suit could disrupt the efforts of FDIC to recover the [bank's] assets, which were depleted by defendants' mismanagement and wrongdoing, for equitable distribution among all depositors and creditors in accordance with the federal priority scheme. . . . According to the FDIC, permitting plaintiffs to sue directly for claims emanating from injury to the [bank] would circumvent the priority scheme by enabling depositors to recover the [bank's] assets in advance of other general creditors and claimants with superior interests, such as secured creditors. This result, argues FDIC, is both inequitable and inefficient, and threatens to further complicate the immense taks of liquidating the [bank's] assets.

Id. at 888-89 (emphasis in original). The Seventh Circuit has made the same point in the context of a shareholder's RICO claim, noting that allowing the derivative suit would lead to double counting of damages and would interfere with an equitable liquidation process:

> Recovery by the firm, followed by division according to entitlements, is especially important when the firm

> has landed in bankruptcy. Suits by shareholders, guarantors, and the like may well be efforts to divert the debtor's assets-to pay off one set of creditors . . . while keeping the proceeds out of the hands of the firm's other creditors.

Mid-State, 877 F.2d at 1336.

This line of reasoning applies fully to the case at bar. BCCI is being liquidated in international proceedings in Luxembourg. Its assets located in the United States have been forfeited and are subject to control of the Justice Department. The appellants in this case have claims similar to those of many other potential claimants. Their claims, if allowed in this lawsuit, would enable them to jump ahead of other creditors in priority and obtain greater shares of the failed bank's assets and of the assets of any wrongdoers who may owe money to the failed bank on account of their wrongs. See United States v. BCCI Holdings (Luxembourg), S.A., —— F.3d ——, Nos. 93-5296, 93-5299, 1995 WL 56674 (D.C. Cir. Feb. 14, 1995). Half of the sums recovered will be surrendered to a global liquidation fund set up to facilitate a "general global distribution to creditors and depositors." Id. at *1. The other half has been reserved for the Attorney General's discretionary allocation to purposes including offsetting losses to the Federal Deposit Insurance Corporation, id., and "protect[ing] the rights of innocent persons." Id. at *7, quoting 18 U.S.C. § 1963 (g)(1). Recently, these appellants attempted to convince one of our sister circuits that they were entitled to an interest in the property so forfeited, the "nature and extent" of which interest could be found in the complaint filed in the case at bar. Id. at *2. Appellants' attempt to jump in line ahead of other creditors was rebuffed in that case, and it is rebuffed here.

Appellants would have us distinguish Sunrise and the other cases on derivative claims, on the basis of Hayes v. Gross, 982 F.2d 104 (3d Cir. 1992). In Hayes, pur-

chasers of stock alleged that they paid too much because of fraud on the market, and sued the officers and directors of the corporation under the Securities Exchange Act of 1934. The Third Circuit distinguished Sunrise, and held that the claim was not derivative. It reasoned that the injury claimed was distinct from the injury to the corporation and the indirect injury to stockholders generally, and also that the claim would neither prejudice the corporation and its other stockholders not permit a double recovery for the same injury. In that case, the harm would of course be only to the shareholders who bought in a market tainted by the misrepresentations, not to those who had bought before, and not to the corporation. We need not decide whether we would follow Hayes, because the facts of the case at bar are analogous to Sunrise, not Hayes.

Because the RICO claims were all properly dismissed for lack of standing, as derivative, we do not reach the questions raised by the parties as to the extraterritorial reach of RICO. We understand the argument to be whether Congress has the power to regulate the foreign conduct at issue, not whether the district court had jurisdiction to decide whether a claim upon which relief could be granted had been pleaded. We assume without deciding that RICO would apply to the foreign wrongs. We do not reach the other rationales articulated by the district court as a basis for dismissal.

AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Crim No. 91-0655

UNITED STATES OF AMERICA

-v-

BCCI HOLDINGS (LUXEMBOURG), S.A., BANK OF CREDIT AND COMMERCE INTERNATIONAL S.A., BANK OF CREDIT AND COMMERCE INTERNATIONAL (OVERSEAS) LIMITED, INTERNATIONAL CREDIT AND INVESTMENT COMPANY (OVERSEAS) LIMITED, *Defendants.*

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK
CRIMINAL TERM

Ind 8090 91

PEOPLE OF THE STATE OF NEW YORK

-v-

BCCI HOLDINGS (LUXEMBOURG), S.A., BANK OF CREDIT AND COMMERCE INTERNATIONAL S.A., BANK OF CREDIT AND COMMERCE INTERNATIONAL (OVERSEAS) LIMITED, INTERNATIONAL CREDIT AND INVESTMENT COMPANY (OVERSEAS) LIMITED, *et al.*, *Defendants.*

PLEA AGREEMENT

Parties and Purpose

WHEREAS, the United States of America, by its attorneys for the United States Department of Justice (the "DOJ"), the People of the State of New York, by the District Attorney for New York County, Robert M. Morgenthau (the "DANY") and Brian Smouha, Jacques Delvaux and Constant Franssens, as Commissairies of BCCI Holdings (Luxembourg) S.A. ("BCCI Holdings"); Brian Smouha, as Commissaire of Bank of Credit and Commerce International, S.A. ("BCCI SA"); Ian Wight and Robert Axford, as Joint Provisional Liquidators of Bank of Credit and Commerce International (Overseas) Ltd. ("BCCI Overseas"); and Ian Wight and Robert Axford as Joint Provisional Liquidators for International Credit and Investment Company (Overseas) Limited ("ICIC") (all such persons acting in the capacities so indicated or their duly appointed successors, being hereinafter collectively referred to herein as the "Court Appointed Fiduciaries"), have engaged in discussions with respect to the subject matter hereof pursuant to Rule 11 of the United States Federal Rules of Criminal Procedure, and, with respect to DANY, under New York law;

WHEREAS, the DOJ and the DANY have pursued investigations into the business and affairs of BCCI Holdings, BCCI SA, BCCI Overseas and ICIC (collectively, "BCCI"), which investigations have developed, for the benefit of law enforcement and regulatory agencies, significant evidence of criminal activity by the prior management of BCCI and both the DOJ and the DANY continue to pursue investigations into the impact of that activity;

WHEREAS, prior to July 5, 1991, BCCI had been a worldwide banking organization with operations in approximately 69 countries and on July 5, 1991 BCCI was closed by bank regulatory authorities in the United King-

dom, the United States, the Cayman Islands, Luxembourg and elsewhere;

WHEREAS, BCCI is presently insolvent, and is subject to insolvency or liquidation proceedings pursuant to the laws of Luxembourg and the Cayman Islands and, in the case of certain agencies and branches of BCCI SA, are awaiting liquidation or in the process of being liquidated in the States of California and New York, and elsewhere;

WHEREAS, the failure of BCCI is likely to cause thousands of innocent depositors and other creditors throughout the world to suffer losses in the aggregate in billions of dollars;

WHEREAS, in order to address the foregoing, the Court Appointed Fiduciaries have been appointed to act as joint provisional liquidators and/or commissaires by courts in the respective domiciles of the BCCI companies to collect all BCCI assets located throughout the world, and liquidate the same for the purpose of achieving the greatest possible distribution to all lawful creditors and depositors of BCCI on a worldwide basis;

WHEREAS, in furtherance of the Court Appointed Fiduciaries' efforts, the Court Appointed Fiduciaries have filed a petition in Bankruptcy Court in the Southern District of New York under Title 11, Section 304 of the Bankruptcy Code seeking the turnover of all BCCI assets in the United States to the Court Appointed Fiduciaries (the "Section 304 Proceeding") and a Temporary Restraining Order has been issued in connection therewith;

WHEREAS, former management and operators of BCCI fraudulently and secretly acquired (1) direct or indirect ownership and control over the shares of First American Bankshares Inc., Washington, D.C. ("First American"), the former National Bank of Georgia,

Atlanta, Georgia, and Independence Bank, Encino, California ("Independence Bank"), and (2) an interest in the former CenTrust Savings Bank, Miami, Florida ("CenTrust");

WHEREAS, the DOJ and federal banking regulators intend to minimize the risk of potential loss to the Bank Insurance Fund and United States taxpayers by obtaining a fund which could provide additional capital to depository institutions and safeguard the Bank Insurance Fund, if either are necessary, in connection with BCCI's secret investment in U.S. financial institutions;

WHEREAS, it appears that the identifiable assets of BCCI in the United States, exclusive of any stock ownership in First American and Independence Bank, constitute approximately $550,000,000 in cash and other assets;

WHEREAS, the prior management and operators of BCCI are no longer involved in any effective decision-making capacity with BCCI, and its worldwide affairs are subject to the control of the Court Appointed Fiduciaries whom the DOJ, the DANY and the other parties hereto recognize, based upon various court appointments, as having full right and authority to act on behalf of BCCI and whom the DOJ and the DANY are willing to support in their efforts to collect and appropriately liquidate and distribute the assets of BCCI in an orderly and fair manner, consistent with the protection of innocent victims of BCCI and the due administration of justice;

WHEREAS, responsible authorities in the United States, the United Kingdom, the Cayman Islands and Luxembourg desire that the assets of BCCI be distributed by the Court Appointed Fiduciaries only in a manner which (a) protects United States taxpayers from potential losses to the banking organizations illegally acquired by BCCI, (b) provides prompt recovery to innocent depositors, creditors and other victims of BCCI, and

(c) ensures, as set forth herein, that no monies are paid to persons who have violated laws forbidding narcotics trafficking, terrorism, money laundering, crimes of violence or other acts generally recognized as felonies or similar crimes under the laws of the United States and other countries subscribing to recognized norms of international justice;

WHEREAS, pleas of guilty entered by the Court Appointed Fiduciaries, on behalf of BCCI, to substantial criminal charges in the United States will address significant U.S. law enforcement interests that the parties hereto believe, once the pleas provided for herein are entered and accepted by the relevant courts and all of the provisions of this Agreement are implemented as provided herein, will resolve all criminal investigations, charges, indictments and all criminal and civil proceedings against BCCI concerning matters occurring before July 5, 1991 subject to the terms and conditions set forth herein, thereby removing a major impediment and in fact facilitating the distribution of substantial BCCI assets to innocent depositors, creditors and other victims of BCCI;

WHEREAS, in addition to the DOJ and the DANY, responsible international law enforcement and regulatory authorities in the United Kingdom, the Cayman Islands and Luxembourg also desire a resolution which balances interests in obtaining an appropriate penalty for illegal corporate conduct and compensation of innocent depositors, creditors and other victims of BCCI;

WHEREAS, the entry of pleas of guilty by the Court Appointed Fiduciaries, on behalf of BCCI, to criminal charges in the United States District Court for the District of Columbia (the "U.S. District Court") and the Supreme Court of the State of New York (the "N.Y. Supreme Court") as provided herein is not intended by the parties hereto to preclude the criminal prosecution of or any civil action against any culpable BCCI officers,

employees, agents or other entities (other than BCCI) or wrongdoers;

WHEREAS, the parties believe that the entry of pleas of guilty by the Court Appointed Fiduciaries, on behalf of BCCI, to criminal charges as provided herein will materially assist in the prosecution of culpable persons and entities (other than BCCI) by permitting DOJ, DANY, and other enforcement authorities to obtain greater access to documents and witnesses through the full cooperation and assistance of the Court Appointed Fiduciaries.

NOW, THEREFORE, the United States of America through the DOJ, the DANY, the Board of Governors of the Federal Reserve System (the "Board of Governors"), the Federal Deposit Insurance Corporation ("FDIC"), the Resolution Trust Corporation (the "RTC"), the Office of Thrift Supervision (the "OTS"), the Office of the Comptroller of the Currency (the "OCC"), the Securities and Exchange Commission ("SEC") the Superintendent of Banks of the State of New York ("N.Y. Banking"), the Superintendent of Banks of the State of California ("California Banking") and the Court Appointed Fiduciaries, with the assistance and support of the Serious Fraud Office of the United Kingdom (the "Serious Fraud Office"), the Public Prosecutor for Luxembourg, and the Attorney General of the Cayman Islands hereby covenant and agree as follows:

THE PLEAS

The Federal Plea

1. The Court Appointed Fiduciaries, acting on behalf of BCCI, will cause BCCI to waive venue and plead guilty in the U.S. District Court to the information, attached hereto as Exhibit A-1 (the "U.S. Information"), which charges BCCI with conspiracy to conduct the affairs of an enterprise through a pattern of racketeering

activity in violation of 18 U.S.C. Sections 1962(c) and (d).

2. The Court Appointed Fiduciaries fully understand the nature and elements of the crimes with which BCCI has been charged in the U.S. Information.

3. The Court Appointed Fiduciaries will cause BCCI to plead guilty because, to the best of their knowledge, they have determined after due inquiry that acts of prior management of BCCI establish that BCCI, as the entity responsible for the acts of such management, is in fact guilty of the charges contained in the U.S. Information and, in causing BCCI to plead guilty to the U.S. Information, the Court Appointed Fiduciaries, on behalf of BCCI, will accept the factual statements set forth in the U.S. Information and the conclusion of the DOJ that these statements provide a legally sufficient factual basis for the plea contemplated in paragraph 1 above.

The New York County Plea

4. The Court Appointed Fiduciaries, acting on behalf of BCCI, will cause BCCI to plead guilty in the N.Y. Supreme Court to counts one through six of New York County Indictment Number 8090/91 ("N.Y. Indictment") (Attached hereto as Exhibit A-2), it being expressly understood that the DANY will move to withdraw, as to BCCI only, at the time of the plea of guilty the second full paragraph of page 5 of said indictment, and the Court Appointed Fiduciaries will consent to that motion.

5. The Court Appointed Fiduciaries fully understand the nature and elements of the crimes with which BCCI has been charged in the N.Y. Indictment.

6. The Court Appointed Fiduciaries will cause BCCI to plead guilty because, to the best of their knowledge, they have determined after due inquiry that acts of prior management of BCCI establish that BCCI, as the entity responsible for the acts of such management, is in fact

guilty of the crimes charged in counts one through six of the N.Y. Indictment as amended pursuant to paragraph 4 and, in causing BCCI to plead guilty to those crimes, the Court Appointed Fiduciaries, on behalf of BCCI, accept that the factual statements set forth in counts one through six of the N.Y. Indictment provide a legally sufficient factual basis for the plea contemplated in paragraph 4 above.

7. The Court Appointed Fiduciaries, on behalf of BCCI, will join with the DANY's recommendation that, a fine of $10,000,000 under the New York Penal Law section 80.15 be imposed, jointly and severally, on the corporate entities defined above as BCCI, payable as provided in paragraph 12 below.

FORFEITURE AND DISGORGEMENT

8.(a) Upon execution of this Agreement by the parties, the Court Appointed Fiduciaries will cause $5,000,000 to be paid as an interim capitalization payment to Independence Bank (the "Interim Capitalization Payment") in exchange for newly issued shares of Independence Bank, which shares shall represent all the outstanding shares of Independence Bank. The shares to be issued pursuant to the Interim Capitalization Payment shall be issued in the name of one or more of the entities constituting BCCI herein and shall be subject to the divestiture Order of the Board of Governors of May 6, 1991 and placed in a trust to manage, control and sell Independence Bank, with an independent trustee to be selected by the Court Appointed Fiduciaries, which trust and trustee will be subject to the approval of the Board of Governors, California Banking, DOJ, and DANY, and subject to paragraph 9(b).

(b) Upon the filing of the U.S. Information, pursuant to 18 U.S.C. Section 1963(d)(1), the DOJ, on behalf of the United States, shall apply to the U.S. District Court with the consent of the Court Appointed Fiduciaries for

an order directing that certain BCCI assets located in the United States, more fully described in Exhibit B, be paid into a custodial account maintained by the Treasury Department in a segregated account within the Department of Justice Seized Asset Deposit Fund in the name of the U.S. District Court (the "Custodial Account"). As proceeds from paragraphs 9(b) through (e) becomes available, the DOJ, on behalf of the United States, shall apply to the U.S. District Court with the consent of the Court Appointed Fiduciaries for appropriate orders effectuating the transfer of proceeds to the Custodial Account for disbursement. During the term of this Agreement, funds in the Custodial Account shall draw interest, which interest will accrue to the Custodial Account. Upon entry of the Forfeiture Order as provided herein, the Custodial Account will be transferred from the Seized Asset Deposit Fund to the Department of Justice Assets Forfeiture Fund. Notice of any payments and transfers relating to the Custodial Account shall be made to the parties by the Treasury Department.

9. Upon entry of a judgment of conviction on the U.S. Information and an order of forfeiture issued pursuant to 18 U.S.C. Sections 1963(a)(1), (2) and (3) (the "Forfeiture Order"), BCCI shall forfeit to the United States the following property of BCCI located in the United States:

(a) all of BCCI's ownership interest in deposits and other assets originally held in those banks and brokerage firms identified on Exhibit B hereto and then paid into the Custodial Account under paragraph 8(b),

(b) the net proceeds from the sale or other disposition or transfer of any stock, security or other interest in Independence Bank, but not the stock, security or other interest itself,

(c) the net proceeds from the sale or other disposition or transfer of any stock, security or other

interest in First American, but not the stock, security or other interest itself,

(d) the balance of the liquidation estates of the Los Angeles and New York agencies of BCCI SA, but not the estates themselves, upon completion of liquidation proceedings conducted by the New York Banking and the California Banking in accordance with the laws of California and New York. For purposes of the foregoing, the "liquidation estates" shall consist of all of the rights and interests of the Superintendent of Banks of the states of New York and California under their respective state law banking statutes, with respect to the assets of BCCI S.A. located in their respective states and the assets of the New York and California agencies of BCCI S.A. The liquidation estates do not include the assets enumerated in Exhibit B, and

(e) the entirety of BCCI's interests in all other property, not identified in clauses 9(a) through (d), located in the United States, including, without limitation, real property and all tangible and intangible personal property.

10. In furtherance of the ongoing liquidation activities of the New York Banking and the California Banking, the New York Banking and the California Banking will attempt to complete their respective liquidations as soon as practicable consistent with their respective statutes and the determinations of their respective courts. Thereafter, they will transfer to the Custodial Account the United States' forfeiture interest in the entire remainder of the liquidation estates, as quickly as reasonably possible.

11. As promptly as practicable after the entry of the Forfeiture Order and, to the extent possible, pending the completion of any proceedings that may be required under 18 U.S.C. Section 1963(l), disbursements shall be made from the Custodial Account to a U.S. Disgorge-

ment, Compensation and Penalty Fund maintained by the Treasury Department within the Department of Justice Assets Forfeiture Fund (the "U.S. Fund") and, subject to paragraphs 13, 14, and 17 below, to a Worldwide Victims and Creditors Compensation Fund maintained by the Court Appointed Fiduciaries (the "Worldwide Victims Fund") as follows:

(a) subject to clause (d) below, the first $100,000,000 deposited in the Custodial Account shall be disbursed to the U.S. Fund for the purposes set forth in paragraph 12;

(b) the next $100,000,000 deposited in the Custodial Account shall be disbursed to the Worldwide Victims Fund;

(c) subsequent deposits to the Custodial Account shall be concurrently disbursed in equal amounts to the U.S. Fund and the Worldwide Victims Fund, except that monies due to the U.S. Fund shall be paid without regard to delays, if any, under paragraph 13(a);

(d) prior to the disbursements described in clauses (a) through (c) of this paragraph 11, the Interim Capitalization Payment described in paragraph 8(a) shall be refunded to the Court Appointed Fiduciaries.

12. As determined in the sole discretion of the Attorney General of the United States (the "Attorney General"), the U.S. Fund shall be used for the following purposes:

(a) to minimize the risk of potential loss to the Bank Insurance Fund of the FDIC and United States taxpayers by providing additional capital, upon the request of the FDIC, OCC and the Board of Governors, to the subsidiary banks of First American, and Independence Bank, or to reimburse the Bank Insurance Fund for any losses it incurs in connection with the sale or disposition of these institutions;

provided, however, that when all said institutions are sold or otherwise disposed of an amount equal to any such capital infusion or insurance fund payment shall first be repaid to the U.S. Fund, with the balance of the net proceeds of the sale or disposition paid in equal amounts through the Custodial Account to the U.S. Fund and the Worldwide Victims Fund;

(b) within one week of the entry of the Order of Forfeiture, the Court Appointed Fiduciaries shall apply for remission, and the Attorney General will remit as soon as available $10,000,000 out of funds deposited in the U.S. Fund pursuant to paragraph 11(c) above for the sole purpose of paying the fine imposed or to be imposed upon BCCI in the N.Y. Supreme Court pursuant to paragraph 7 of this Agreement; it being understood and agreed that the distribution set forth under this paragraph shall take precedence over all other distributions from the U.S. Fund, obtained under paragraph 11(c), unless there is written consent otherwise of both the Attorney General and the DANY;

(c) to satisfy a punitive forfeiture in an amount to be determined in the sole and absolute discretion of the Attorney General;

(d) to compensate the DOJ for the reasonable costs of investigation and prosecution of BCCI and any former employees, officers or agents of BCCI, or other individuals who assisted its criminal activities;

(e) to compensate the DANY for the reasonable costs of its investigation and prosecution of BCCI and continued investigation of the activities of former employees, officers or agents of BCCI, should DANY make an application for equitable sharing;

(f) for restitution to victims of BCCI, which may include remission to the Court Appointed Fiduciaries

in accordance with 18 U.S.C. Section 1963(g) for the purpose of facilitating an increase in assets available for distribution by the Court Appointed Fiduciaries to innocent worldwide victims of BCCI, and which may include claims related to the failure of CenTrust, if any;

(g) to reimburse the Board of Governors, FDIC, RTC, OTS, OCC, SEC for the reasonable costs of their investigations of, and civil and administrative proceedings against BCCI and related persons and entities.

(h) to take other appropriate measures as authorized pursuant to 18 U.S.C. Sections 1963(f) and (g).

The DOJ will notify DANY of disbursements from the U.S. Fund.

13. Disbursements to the Worldwide Victims Fund are conditioned on availability of funds under paragraph 11, establishment of a screening mechanism under paragraph 14, and, as provided in clause (a) below, the cooperation requirements of paragraphs 17 and clauses 21(c) and (e). The amounts payable to the Worldwide Victims Fund shall be paid every 15 days beginning as soon as practicable after entry of the Forfeiture Order in increments of $50,000,000 (or such lesser amounts as are available) until all funds are paid unless:

(a) DOJ or DANY have filed written notice with the Court Appointed Fiduciaries specifying the details of a violation of or a failure to comply with paragraph 17, or in the case of an alleged violation of or failure to comply with clauses (c) and (e) of paragraph 21, upon similar written notice filed by the DOJ with the Court Appointed Fiduciaries, in which case payments will be deferred until the parties resolve any dispute over such cooperation. Any dispute not resolved by the parties within 10 days

of such notification may be referred by any party to the District Court for resolution. Upon resolution of any objection under this section, transfers will resume promptly as provided above.

(b) During the pendency of any delay by virtue of objections under clause (a) above, interest which accrues on these funds held in the Custodial Account shall accrue to the benefit of the Worldwide Victims Fund and shall be payable at the same time as and together with the principal to which it relates.

14. Prior to the transfer of funds to the Worldwide Victims Fund pursuant to paragraph 13, the Court Appointed Fiduciaries shall have established an international screening mechanism acceptable to the DOJ and DANY that assures, consistent with the laws of the countries governing the distribution of the Worldwide Victims Fund by the Court Appointed Fiduciaries, that such funds will be distributed only to innocent depositors, creditors and other victims of BCCI whose claims are not derived directly or indirectly through violations of United States or other laws concerning narcotics, terrorism, money laundering, crimes of violence, or other acts generally recognized as felonies or similar crimes under the laws of countries subscribing to recognized norms of international justice. The screening mechanism shall, where appropriate, incorporate participation of the Bank of England, the Serious Fraud Office, the Public Prosecutor of Luxembourg, and the Attorney General of the Cayman Islands and the assistance of the United States Federal Bureau of Investigation and the DANY.

15. In the unlikely event that funds in the Worldwide Victims Fund and funds otherwise available to the Court Appointed Fiduciaries exceed the amount required for full compensation of the innocent depositors, creditors and other victims of BCCI described in paragraphs 14 above, the excess funds will be returned to the United

States for deposit into the U.S. Fund and distribution as contemplated in paragraph 12 above.

MISCELLANEOUS PROVISIONS

16. The parties hereto agree to assist each other in effectuating the Forfeiture Order and taking whatever action may be reasonably necessary to protect the interests of the parties hereto in the property ordered forfeited, including, without limitation, identifying and collecting BCCI assets and causing the transfer thereof to the Custodial Account, promptly addressing claims and objections to the Forfeiture Order filed by third parties pursuant to 18 U.S.C. Sections 1963(g) and/or 1963(l) and, subject to the terms of this Agreement, transferring funds to the U.S. Fund and the Worldwide Victims Fund as provided herein.

17.(a) The Court Appointed Fiduciaries agree to cooperate fully with the DOJ and the DANY in their ongoing investigations and related proceedings concerning BCCI and BCCI related activities, individuals and entities, to the fullest extent allowed under applicable United States and foreign law.

(b) As used in this paragraph:

(i) "investigative information" includes documents, records, tangible evidence or other information concerning BCCI and related activities, individuals and entities requested by DOJ or DANY.

(ii) "production" of investigative information means to obtain access to, provide originals of where practicable, make and provide copies of, and permit use of such information, as specified by the requesting party.

(c) In the event that the Court Appointed Fiduciaries conclude that production of investigative in-

formation violates a relevant and applicable foreign law, the Court Appointed Fiduciaries will promptly:

(i) notify the requesting party detailing the legal prohibition or limitation to production, access, copying or other use of said information;

(ii) comply, in as complete a form as possible, with the request, in a manner that does not result in a violation of the asserted foreign law inhibition; and

(iii) take such reasonable steps, including seeking appropriate waivers from appropriate persons and entities, and making applications or joining in applications made by the requesting party, at the discretion of the requesting party, to appropriate courts or other bodies to attempt to meet the foreign legal requisites necessary to permit compliance or overcome the foreign legal barriers inhibiting compliance.

(d) Cooperation hereunder includes, but is not limited to the following, consistent with clauses (a), (c), and (e) through (g) herein:

(i) The Court Appointed Fiduciaries agree to produce to the DOJ and the DANY any investigative information that is subject to the control of the Court Appointed Fiduciaries.

(ii) The Court Appointed Fiduciaries agree to use their good offices, when requested by either the DOJ or the DANY, to facilitate production of investigative information in the custody or control of third parties.

(iii) At the request of the DOJ or the DANY, the Court Appointed Fiduciaries will direct any employee or other person subject to their control to testify in any duly convened grand jury,

court, or other criminal, investigative, or administrative proceeding, and will, in addition, use their good offices and, at the expense of the DOJ, all reasonable efforts to persuade former employees, clients, and shareholders of BCCI, and others to cooperate with the requesting party and to testify in any such proceeding.

(iv) The Court Appointed Fiduciaries agree to waive any privileges, including the attorney-client, accountant-client, and work product privileges, with respect to any investigative information existing as of July 5, 1991.

(v) The Court Appointed Fiduciaries further agree to provide investigative information created after July 5, 1991 to the DOJ and the DANY relating to the tracing and locating of assets that flowed from or to BCCI and BCCI related entities and persons as a result of criminal activity.

(e) With respect to investigative information created after July 5, 1991, it is not the intent of this Agreement to require the Court Appointed Fiduciaries to waive the attorney client privilege in connection with documents or communications reflecting or containing legal advice to the Court Appointed Fiduciaries or attorney work product related thereto or otherwise pertaining to the subject matter of their appointments.

(f) Where investigative information is requested that:

(i) was created after July 5, 1991,

(ii) was created for the purpose of negotiating settlement of specific creditor or depositor claims, and

(iii) would, in the opinion of the Court Appointed Fiduciaries, pose a substantial risk of jeopardizing the specific negotiations or materially interfere with the lawful performance of their fiduciary obligations, the Court Appointed Fiduciaries will so inform the requesting party and provide the requesting party an estimate of how long the perceived inhibition to disclosure would persist, and will pursue, if requested by the requesting party, efforts, including resort to an appropriate judicial body, to permit the disclosure of the requested information under circumstances that will preserve confidential and secure treatment of the information and avoid the risk of interference noted above.

(g) The DOJ agrees to assume the reasonable costs of obtaining production of the foregoing for the DOJ and the DANY, upon advance notice of the approximate cost and a statement of the reasons why such production is necessary.

18. As part of the sentence imposed in connection with the entry of the pleas contemplated in paragraphs 1 and 4 above, the Court Appointed Fiduciaries agree that BCCI shall be barred from doing business within the United States except upon written notice to the DOJ and the express written permission of the appropriate Department or Agency of the United States, and with respect to doing business within the State of New York, except upon the further written notice to the DANY and the express written permission of the New York Banking, and with respect to business in the State of California, except upon the express written permission of California Banking. This provision is not intended to limit the activities of the Court Appointed Fiduciaries, pursuant to their respective court or other appointments, within

the United States, in connection with the liquidation of BCCI. Additionally, before any person, other than the Court Appointed Fiduciaries, is appointed to act in a trustee or fiduciary capacity affecting assets located in the State of New York, the approval of the DANY and the New York Banking shall be obtained, and with respect to assets in California, the approval of California Banking shall be obtained.

19. The Court Appointed Fiduciaries will obtain, with the assistance of DOJ and DANY where appropriate, all regulatory, judicial, administrative or other filings, notices, applications, consents, orders or approvals required to be obtained in order for the Court Appointed Fiduciaries, on behalf of BCCI, to satisfy fully their obligations under this Agreement, including seeking any necessary modification of the Temporary Restraining Order, the Court Appointed Fiduciaries' request for a preliminary injunction in the Section 304 Proceeding and/or the Consent Order entered in connection with the 304 Proceeding on October 16, 1991.

20. The Court Appointed Fiduciaries agree to:

(a) consent to the assessment in the amount claimed in the civil monetary penalty action brought by the Board of Governors against BCCI on July 29, 1991; and

(b) comply with the Divestiture Orders issued by the Board of Governors on March 4, 1991 and May 6, 1991 (the "Board Orders").

The Board of Governors agrees to stay and not seek execution of that assessment against any property forfeited under this Agreement or located outside the United States and to not file any claim for this assessment in the New York or California BCCI SA liquidations or in any liquidation proceeding involving BCCI in Luxembourg, the Cayman Islands or elsewhere.

21. Subject to paragraph 20, the Board of Governors, FDIC, RTC, OTS, OCC and the New York and Cali-

fornia Banking agree to forego additional civil monetary penalty and other similar damage actions wherein they seek funds from or make claims against the Worldwide Victims Fund, the liquidation estates in the New York and California liquidation proceedings for BCCI S.A., and foreign assets and liquidation estates of BCCI, except as follows:

(a) The FDIC, RTC, OTS, OCC and New York and California Banking specifically reserve their ability, as conservators, liquidators and receivers, and potential conservators, liquidators and receivers, to file compensatory claims in the foreign liquidation process, in accordance with the appropriate foreign law. Provided, however, that if Independence Bank and First American are sold or otherwise disposed of without loss to the Bank Insurance Fund, the FDIC will not file any such claim.

(b) Further, the FDIC, RTC, OTS, OCC, New York Banking and California Banking further reserve their ability on behalf of U.S. financial institutions acting as such or in their corporate capacity, or acting as a conservator, liquidator or receiver to pursue civil contract claims.

(c) Additionally, the Board of Governors and joint issuers of the Board of Governors Orders may enforce the Board's Orders or subsequent orders issued by them in connection with the required divestiture of BCCI's interests in First American or Independence Bank.

(d) The SEC agrees to forgo any enforcement action against BCCI related to the acquisition and sale of stock and other securities in connection with the financial institutions described in the U.S. Information.

(e) The Court Appointed Fiduciaries also agree to cooperate with the Board of Governors, FDIC, RTC, OTS, OCC, and SEC in their investigations of BCCI-related wrongdoing, and in related proceedings, in the manner described in paragraph 17 above.

(f) The Court Appointed Fiduciaries release any and all claims which they may have against the Board of Governors, FDIC, RTC, OTS, OCC, SEC, New York Banking and California Banking for actions taken in their respective regulatory capacities.

(g) Nothing in this Agreement bars New York Banking or California Banking from recovering their administrative expenses from their respective liquidation proceedings, in accordance with their respective state laws.

22. The United States and the DANY agree that, should the U.S. District Court and the N.Y. Supreme Court accept the pleas contemplated in paragraphs 1 and 4 above, and should the U.S. District Court enter the Forfeiture Order all pending criminal charges heretofore brought against BCCI by either of them shall be concluded and neither will bring any additional criminal charges against BCCI for matters occurring before July 5, 1991.

23. Pursuant to Rule 11(e)(1)(C) of the Federal Rules of Criminal Procedure, the parties agree that the specific sentence, including the Forfeiture Order, set forth in this Agreement provides the appropriate disposition of this case and that the parties will ask the Court to enter a Judgment of Conviction and issue a Forfeiture Order consistent with this Agreement within 10 days of the entry of the pleas in this case, considering that time is of the essence (or such other date as the U.S. District Court may set). If the U.S. District Court accepts the agreed sentence including the forfeiture as set forth above, the Court Appointed Fiduciaries, on behalf of BCCI, may not withdraw the plea contemplated in paragraph 1 above as a matter of right under Federal Rule of Criminal Procedure 11(e)(2) and (4). The Court Appointed Fiduciaries, on behalf of BCCI, understand that the Forfeiture Order of the U.S. District Court is enforceable both as a part of the sentence and in the same manner as a civil judgment. Should the judge refuse to accept the forfeiture

aspect of the sentence, this Agreement shall become null and void and no party will be bound hereto.

24. The Court Appointed Fiduciaries and their attorneys acknowledge that no threats, promises, or representations have been made, nor agreements reached, other than those set forth in this Agreement, to induce the Court Appointed Fiduciaries to enter a plea of guilty on behalf of BCCI. The Court Appointed Fiduciaries understand that failure to abide by any term of the Agreement is a violation of the Agreement and may render it null and void or result in such sanction as may be determined by the U.S. District Court or N.Y. Supreme Court. The Court Appointed Fiduciaries further agree this Agreement shall be filed and become a part of the record in the U.S. District Court and the N.Y. Supreme Court.

25. The parties hereto understand and agree that all of the agreements contained herein shall be conditional on each such agreement and if, for any reason, the U.S. District Court, the N.Y. Supreme Court, or any other United States court of competent jurisdiction shall find any provision of this Agreement to be unenforceable, this Agreement may become null and void, at the option of either the DOJ, DANY and Court Appointed Fiduciaries, and no party hereto will be bound hereto.

26. This Agreement may be executed in one or more identical counterparts, whether transmitted by telecopier or otherwise. Each such counterpart shall be deemed to be an original for purposes of this Agreement.

27. This Agreement sets forth the entire understanding of the parties hereto with respect to the subject matter hereof. Except as explicitly set forth in this Agreement, there are no representations, warranties, or inducements —oral, written, expressed or implied—that in any way affect the validity of this Agreement or any of its terms. All prior negotiations, oral and written, are merged in this Agreement. Evidence of such negotiations, including prior drafts, shall not be admissible for any purpose in

any proceeding related to this Agreement or its performance. Any amendments shall be with the mutual, written consent of the parties.

28. This Agreement shall be governed by and construed in accordance with the laws of the United States of America, except with respect to the matters contemplated in paragraph 4 through 7 hereof which, only to the extent necessary, shall be construed in accordance with applicable New York law.

29. The Court Appointed Fiduciaries agree to a tolling of any applicable statute of limitations as to criminal matters related to BCCI during the term of this Agreement and for 90 days thereafter.

WAIVER OF TRIAL RIGHTS

30. The Court Appointed Fiduciaries have read the charges against BCCI contained in the U.S. Information and the N.Y. Indictment, and those charges have been fully explained to them by their attorneys.

31. The Court Appointed Fiduciaries understand that in accordance with federal law, 18 U.S.C. Section 3013, upon entry of judgment of conviction, BCCI will be assessed $50 for each count, in addition to any other penalty imposed pursuant to this Agreement. Similarly, the Court Appointed Fiduciaries understand that in accordance with New York law, Penal Law Section 60.35, each of the pleading corporate entities upon entry of judgment of conviction, will be assessed a $100 mandatory surcharge and a $2 crime victim assistance fee, in addition to any other penalty imposed.

32. The Court Appointed Fiduciaries understand that by entering a guilty plea on behalf of BCCI, they surrender certain rights under federal and New York State law, including the following:

(a) If BCCI persisted in a plea of not guilty to the charges against it, BCCI would have the right to

a public and speedy trial. The trial could be either a jury trial or a trial by the judge sitting without a jury. BCCI has a right to a jury trial. However, in order that the trial be conducted by the judge sitting without a jury, BCCI, under New York law, and BCCI, the government and the judge, under federal law, all must agree that the trial be conducted by the judge without a jury.

(b) In the federal and New York prosecutions, if the trial is a jury trial, the jury would be composed of twelve laypersons selected at random. BCCI and its attorney would have an opportunity to seek the removal of prospective jurors for cause where actual bias or other disqualification is shown, or without cause by exercising so-called peremptory challenges. The respective juries would have to agree unanimously before it could return a verdict of either guilty or not guilty, as to each count of the U.S. Information and the N.Y. Indictment. The respective juries would be instructed that BCCI is presumed innocent, and that it could not convict BCCI unless, after hearing all the evidence, it was persuaded of BCCI's guilt beyond a reasonable doubt, and that it was to consider each count of the U.S. Information and the N.Y. Indictment separately.

(c) If BCCI and the government waive the right to a jury trial, the appropriate court after hearing all the evidence, and considering each count separately, would determine whether or not it was persuaded of BCCI's guilt beyond a reasonable doubt in connection with the U.S. Information and the N.Y. Indictment.

(d) At a federal and New York state trial, whether by a jury or a judge, the prosecution would be required to present its witnesses and other evidence against BCCI. BCCI would be able to confront those prosecution witnesses and its attorney

would be able to cross-examine them. In turn, although it would not be obligated to do so, BCCI could require the attendance of its witnesses within the territorial jurisdiction of the United States through the subpoena power of the court, or in connection with the N.Y. Indictment, as provided under New York law.

(e) BCCI would have the right to have the charges outlined in the U.S. Information brought by indictment upon the concurrence of not less than 12 members of a grand jury, comprised of at least 16 and not more than 23 persons, that there is probable cause for the charges.

(f) Should the plea to the U.S. Information occur prior to entry of the guilty plea to the New York Indictment, the Court Appointed Fiduciaries waive any defense to the N.Y. Indictment based upon the New York State Double Jeopardy law in order to permit the guilty plea to the New York State Indictment to be entered as provided herein.

33. The Court Appointed Fiduciaries, on behalf of BCCI, understand that by entering a plea of guilty as provided herein, the Court Appointed Fiduciaries, on behalf of BCCI, are waiving all the rights set forth in the prior paragraph. The Court Appointed Fiduciaries' attorneys have explained those rights to the Court Appointed Fiduciaries, and the consequences of the waiver of those rights as contemplated herein. The Court Appointed Fiduciaries understand that they are waiving all appellate issues that might have been available if they had exercised its right to trial.

34. Upon imposition of the sentence contemplated herein, the DOJ will move to dismiss the remaining charges against BCCI currently pending in any U.S. District Court.

IN WITNESS WHEREOF, the parties hereto have executed this Agreement as of December 19th, 1991.

Agreed by United States, and the People of the State of New York:

By:

Department of Justice

Through:

William P. Barr
Attorney General

By /s/ George J. Terwilliger
GEORGE J. TERWILLIGER
Acting Deputy Attorney General

By /s/ Robert S. Mueller III
ROBERT S. MUELLER III
Assistant Attorney General
Criminal Division

By /s/ [Illegible] Acting
SHIRLEY D. PETERSON
Assistant Attorney General
Tax Division

By /s/ Stuart M. Gerson
STUART M. GERSON
Assistant Attorney General
Civil Division

People of the State of
New York

By:

/s/ Robert M. Morgenthau
ROBERT M. MORGENTHAU
District Attorney
New York County

And the following
United States Attorneys:

/s/ J.B. Stephens
JAY B. STEPHENS
District of Columbia

/s/ Robert W. Genzman
ROBERT W. GENZMAN
M.D. Florida

OTTO G. OBERMAIER
S.D. New York

/s/ Joe D. Whitley
JOE D. WHITLEY
N.D. Georgia

/s/ Lourdes G. Baird
LOURDES G. BAIRD
C.D. California

/s/ Dexter W. Lehtinen
DEXTER W. LEHTINEN
S.D. Florida

Agreed by Court Appointed Fiduciaries

By:

But in the name and on behalf of the company by authority of the court and without personal liability

/s/ JD, CF, BAS

COMMISSAIRES OF BCCI HOLDINGS (LUXEMBOURG) S.A., not in their individual capacities

/s/ Brian Smouha
BRIAN SMOUHA

/s/ Jacques Delvaux
JACQUES DELVAUX

/s/ Constant Franssone
CONSTANT FRANSSONE

COMMISSAIRE OF BANK OF CREDIT AND COMMERCE INTERNATIONAL, S.A., not in his individual capacity

/s/ Brian Smouha
BRIAN SMOUHA

JOINT PROVISIONAL LIQUIDATORS OF BANK OF CREDIT AND COMMERCE INTERNATIONAL (OVERSEAS) LTD., and INTERNATIONAL CREDIT AND INVESTMENT COMPANY (OVERSEAS) LTD., not in their individual capacities

/s/ Ian Wight
IAN WIGHT

ROBERT AXFORD

Agreed by U.S. Regulators:

BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM

By: /s/ William W. Wiles
WILLIAM W. WILES
Secretary

FEDERAL DEPOSIT INSURANCE CORPORATION

By: /s/ William Taylor
WILLIAM TAYLOR
Chairman

RESOLUTION TRUST CORPORATION

By: /s/ William Taylor
WILLIAM TAYLOR
Chairman

OFFICE OF THE COMPTROLLER OF THE CURRENCY

By: /s/ Robert L. Clarke
ROBERT L. CLARKE
Comptroller of the Currency

OFFICE OF THRIFT SUPERVISION

By: /s/ Timothy Ryan
TIMOTHY RYAN
Director

SECURITIES AND EXCHANGE COMMISSION

By: /s/ Richard C. Breeden
RICHARD C. BREEDEN
Chairman

Agreed by New York State Regulators:

SUPERINTENDENT OF BANKS OF THE STATE OF NEW YORK, in his capacity as Liquidator of the New York Agency of Bank of Credit & Commerce International, S.A.

By: /s/ Derrick D. Cephas
Name:
Title:

By:
JAMES E. GILLERAN

SUPERINTENDENT OF BANKS OF STATE OF CALIFORNIA, As Such and As Liquidator of California Property and Business of Bank of Credit and Commerce International, S.A.

Agreed by California State Regulators:

SUPERINTENDENT OF BANKS OF STATE OF CALIFORNIA, As Such and As Liquidator of California Property and Business of Bank of Credit and Commerce International, S.A.

/s/ James E. Gilleran
JAMES E. GILLERAN
Superintendent

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Docket No. CR 91-0655

Washington, D.C.
January 24, 1992
10:00 a.m.

UNITED STATES OF AMERICA

vs.

#1—BCCI HOLDINGS (LUXEMBOURG), S.A.,

#2—BANK OF CREDIT AND COMMERCE INTERNATIONAL, S.A.,

#3—BANK OF CREDIT AND COMMERCE INTERNATIONAL (OVERSEAS) LIMITED,

#4—INTERNATIONAL CREDIT AND INVESTMENT COMPANY (OVERSEAS) LIMITED,

Defendants

TRANSCRIPT OF PLEA ACCEPTANCE
AND SENTENCE BEFORE THE
HONORABLE JOYCE HENS GREEN
UNITED STATES DISTRICT JUDGE

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[2]

PROCEEDINGS

THE DEPUTY CLERK: Criminal Action 91-655, United States of America versus BCCI Holdings (Luxembourg), S.A., Bank of Credit and Commerce Interna-

tional, S.A., Bank of Credit and Commerce International (Overseas) Limited, and International Credit and Investment Company (Overseas) Limited. Mr. Raphaelson, Mr. Carver, Mr. Cassella, Mr. Dubester for the Government; Mr. Nussbaum, Mr. Lewis, Mr. Davis, Mr. Sheldon and Mr. Smouha for the Defendants.

THE COURT: Fifteen days ago, on January 9th of this year, pursuant to a scheduled proceeding, the four corporate defendants, BCCI Holdings (Luxembourg), S.A., Bank of Credit and Commerce International, S.A., Bank of Credit and Commerce International (Overseas) Limited, and International Credit and Investment Company (Overseas) Limited, collectively referred to as the BCCI defendants, appeared in open court.

Brian Smouha, in his authority as court-appointed fiduciary and as designated representative of the other court-appointed fiduciaries, also collectively court-appointed fiduciaries, tendered the Defendants' guilty pleas to the superseding information which had been filed in this Court on December 19th, 1991. That superseding information, in essence, charges the BCCI defendants with conspiracy to conduct the affairs of the enterprise through a pattern of racketeering activity, in violation of Title 18, United States Code, Sections [3] 1962(c) and 1962(d), and aiding and abetting under Section 2 of that title.

The written plea agreement between the United States of America and the four BCCI defendants was also filed that date, and in accordance with the Federal Rules of Civil Procedure, Rule 11(e)(1)(C), the parties have agreed that the specific sentence set forth in that plea agreement, including the forfeiture provisions, is the appropriate disposition of the case.

The Court makes the following findings:

By their guilty pleas in this United States District Court for the District of Columbia, the BCCI corporate defendants have expressly made waivers of venue and have proceeded to their guilty pleas by way of a superseding in-

formation, expressly waiving their constitutional rights to indictment and trial either by jury or by the Court. They have further expressly waived other constitutional rights, in written form and orally at the January 9th hearing, including, inter alia, the right to confrontation, to cross-examination, to put the Government to its burden of proof, and to elect whether or not to put on a defense. They have further expressly waived their rights of appeal.

All of the Defendants' waivers have been made knowingly and voluntarily, with full and informed understanding of the nature, contents and consequences of the pleas. The Defendants' [4] guilty pleas have followed valued advice of their various counsel, proclaimed satisfactory to the Defendants.

The Defendants are competent to make these guilty pleas which have been tendered by the court-appointed fiduciaries through Mr. Smouha. Those court appointments are recognized and accepted by this Court.

There have been no promises, threats, coercion, or duress of any kind made to the Defendants in the process that led to the plea agreement or in the tendering of that plea agreement.

The written plea agreement constitutes the full agreement of the parties. It sets forth their entire understanding and includes the written memorandum of intent filed also on December 19, 1991. And all parties have further agreed and accepted at the January 9th hearing their understanding that, in addition to other provisions of the specific sentence agreed upon, there would be, under 18 U.S.C. 3013(a)(2)(B), a $200 assessment for each defendant in each count of this information upon entry of conviction.

There is a full and detailed factual predicate for the guilty pleas. The BCCI corporations, as they have stated through their court-appointed fiduciaries, are pleading guilty because they are in fact guilty of the serious offenses and each of the underlying acts charged in the superseding information.

The BCCI defendants have not only agreed to plea guilty [5] and have done so, but urge the Court to accept their guilty pleas and the proposed sentence. The United States of America joins in urging the Court to accept those pleas of guilty and the proposed disposition.

The BCCI defendants and the United States of America have articulated at length in their plea agreement, at the January 9th hearing, and again through their more recent responses to nonparty filings, their precise views as to why in the public interest this Court should accept the guilty pleas and the accompanying proposed specific sentence.

Additionally, although 18 U.S.C. 1963(i) expressly prohibits nonparties from intervening in this criminal case, except as provided in Subsection (1), this Court has considered each of the submissions timely made by the persons or entities not parties to this criminal proceeding.

The Court realizes, as Mr. Nussbaum articulates so well in one of his written submissions, that, quote, there is no agreement that can be reached which would satisfy all of the diverse and irreconcilable parochial interests, end quote, that exist in this case. Nonetheless, the plea agreement now before the Court reflects on a truly global measure extraordinary efforts and amazing cooperation of a multitude of signatories representing a myriad of jurisdictions to fully settle actions against the corporate defendants, which had operated in 69 countries around the globe, and through that plea resolution, to [6] locate and protect all realizable assets of BCCI for the ultimate benefit of the depositors, creditors, United States financial institutions, and other victims of BCCI. The promise of the plea agreement is that those extraordinary efforts, that amazing cooperation, shall continue.

Upon consideration of the views of the parties and the nonparties to this case, the Court concludes that acceptance of the plea agreement is in the public interest. The agreement permanently incapacitates BCCI from ever again doing business in the United States, except, of course, as part of the liquidation proceedings currently pending.

Through the world-wide victims fund to be created pursuant to the agreement, innocent victims of BCCI's wrongdoing can recover at least a portion of lost assets in as fair a manner as possible—equitable, orderly, and expeditious. Because the fund will be administered on a global scale through unified proceedings, piecemeal and unfair distribution can be avoided.

The plea agreement provides for the rehabilitation of United States financial institutions harmed by BCCI's criminal activity. Infusion of capital gained pursuant to the agreement will largely minimize the cost of potential damage inflicted by BCCI upon United States banks and other financial institutions and will help to ensure the viability of those institutions.

Importantly, the plea agreement resolves all criminal [7] litigation against BCCI in the United States and, consequently, avoids the high cost of protracted and expensive litigation against those corporate defendants. Moreover, the agreement secures the continuing cooperation of BCCI's court-appointed fiduciaries in the investigation and prosecution of individuals involved in related criminal activity. Such facilitation will result in the massive release of documents not otherwise readily obtainable, if at all, and, as a result, will most likely assist in bringing culpable individuals to justice while substantially increasing the amount of assets available to creditors.

Accordingly, in furtherance of the public interest and at the request of the parties, the Court accepts the four corporate BCCI defendants' pleas of guilty and the plea agreement between those defendants and the United States of America, and will embody in the judgment and sentence the disposition provided for in the plea agreement.

The Court finds further that there is in the record information sufficient to enable the meaningful exercise of sentencing authority without the requirement of a presentence investigation and report, and therefore will proceed directly to the sentencing.

But first, unless waived, the parties and counsel are always afforded an opportunity to speak at time of sen-

tence. Mr. Smouha, as the court-appointed fiduciary for the four BCCI corporate defendants, is there anything further you wish to say [8] at this time of sentence?

MR. SMOUHA: No, Your Honor. Nothing further.

THE COURT: All right.

Mr. Nussbaum, as counsel, is there anything further you wish to say, sir?

MR. NUSSBAUM: Nothing further, Your Honor.

THE COURT: Mr. Raphaelson, on behalf of the United States of America, anything further you wish to say, sir?

MR. RAPHAELSON: No, thank you, Your Honor.

THE COURT: As to the sentence. As to each of the BCCI corporate defendants, that is, BCCI Holdings (Luxembourg), S.A., Bank of Credit and Commerce International, S.A., Bank of Credit and Commerce International (Overseas) Limited, and International Credit and Investment Company (Overseas) Limited, the Court enters a judgment of conviction on the pleas of guilty to 18 United States Code, Sections 1962(c) and 1962(d) and 18 United States Code, Section 2.

In consideration of the forfeiture provisions, which will hereafter be reflected in a separate order, there will be no additional fine. Each of the corporate BCCI defendants is assessed for the mandatory victim assistance fund, and pursuant to 18 U.S.C. 3013(a)(2)(B), the sum of $200, to be paid within 60 days.

The order of forfeiture will be entered momentarily. And with that order of forfeiture, the provisions of 18 United [9] States Code, Section 1963, become the vehicles through which the claims of the nonparties may be addressed. As counsel have repeatedly said, and the Court agrees, there should be no interest of BCCI or the United States of America in forfeiture of property that properly belongs to others.

The parties have given their assurance that there will not be needless litigation over any (1) claim issue that may come before the Court. And if the (1) claimants

reflect the same spirit of energy and cooperation that has sparked the way and has led the parties to this day, that is, the parties, the other signatories and other courts, then that prophecy can be realized.

The worldwide collapse of BCCI six months ago has brought enormous and continuing tragedy to innocent victims. Fraud and mismanagement by BCCI's former operators ripped through the economic security of more than one million depositors and creditors. It is a fact that whatever is done here today, we cannot now, and not even eventually, completely erase that tragedy. But no one has offered the Court a better alternative than the one accepted by the Court.

We shall, each of us, do the best possible for the most. The judgment entered today, with the accompanying order of forfeiture, opens those doors.

There will be a brief pause.

The order of forfeiture has been signed. Copies of [10] that order of forfeiture, after they have been stamped by my Deputy Clerk, will be made available for those who might have some interest in them.

I wish you all good day.

(Proceedings concluded at 10:15 a.m.)